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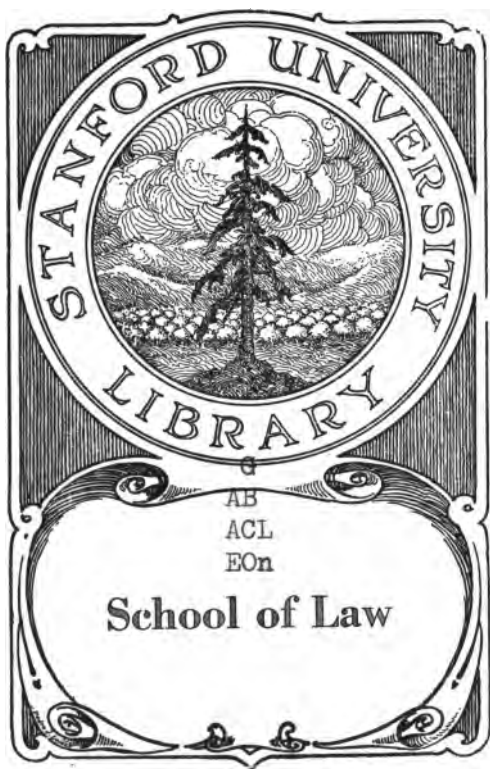
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My dear Mr. Smith Sept. 1, 1862

Edw. Cuth

1862

Michals

1881

N O T E S

TO

BLACKSTONE'S COMMENTARIES,

WHICH ARE CALCULATED TO

ANSWER ALL THE EDITIONS.

BY EDWARD CHRISTIAN, ESQ.

BARRISTER AT LAW, AND PROFESSOR OF THE LAWS OF ENGLAND
IN THE UNIVERSITY OF CAMBRIDGE.

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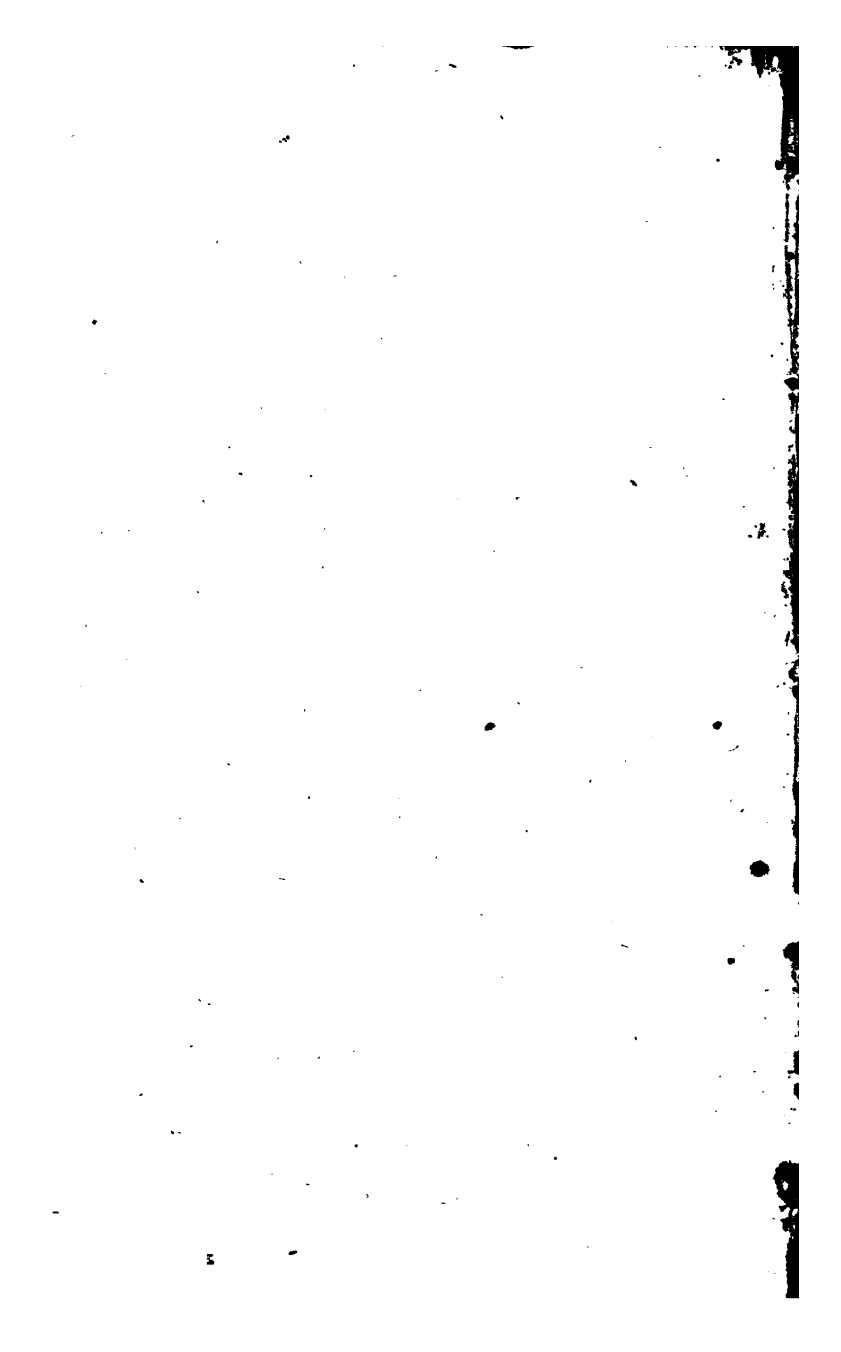
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MR. CHRISTIAN'S NOTES

TO

BLACKSTONE'S COMMENTARIES.

INTRODUCTION.

SECTION THE FIRST.

Of the Study of the Law.

Note 1, page 6, line 25, word *power*.—SEE the Editor's reasons for his disapprobation of this definition of liberty in his note to p. 128.

Note 2, page 19, line 8; word *each*.—Though the civil law, in matters of contract and the general commerce of life, may be founded in principles of natural and universal justice, yet the arbitrary and despotic maxims, which recommended it as a favorite to the pope and the Romish clergy, rendered it deservedly odious to the people of England. *Quod principi placuit legis habet vigorem*, (Inst. 1. 2. 6.) the *magna charta* of the civil law, could never be reconciled with the *judicium parium vel lex terra*.

Note 3, page 19, line 19, word *rarely*.—The inns of court are, the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn, from which societies alone, students are called to the bar. The inns of chancery are, Clifford's Inn, Clement's Inn, Lion's Inn, New Inn, Furnival's Inn, Thavies's Inn, Staple's Inn, and Barnard's Inn. These are subordinate to the inns of court; the three first belong to the Inner Temple, the fourth to the Middle Temple, the two next to Lincoln's Inn, and the two last to Gray's Inn. (Dug. Orig. jurid. 320 & *passim*.) Gentlemen are never entered at present in the inns of chancery with an intention of being called to the bar, for admission there would now be of no avail with regard to the time and attendance required by the inns of court.

Note 4, page 32, (to the note of this page) word *Cambridge*.—The two first were, Lord Northington and Lord Chief Justice Willes; the third, Lord Mansfield; and the fourth, Sir Thomas Sewell, Master of the Rolls.

Note 5, page 32, line 34, word *concern*.—The learning, which of late years has distinguished the bar, leaves little reason to apprehend that such will speedily be the degraded state of the laws of England. Our author's labours and example have contributed in no inconsiderable degree to rescue the profession from the reproaches of Lord Bolingbroke, whose sentiments upon the education of a barrister, correspond so fully with those of the learned judge, that they deserve to be annexed to this elegant dissertation on the study of the law.

"I might instance (says he) in other professions, the obligations men lie under of applying to certain parts of history; and I can hardly forbear doing it in that of the law, in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety-nine in a hundred at least, to use some of Tully's words, *nisi leguleius quidem cautus, et acutus praeo actionum, cantor formularum, auceps syllabarum*. But there have been lawyers that were orators, philosophers, historians; there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the *vantage ground*, so my Lord Bacon calls it, of science, instead of grovelling all their lives below, in a mean but gainful application to all the little arts of chicanery. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions; and whenever it happens one of the vantage grounds to which men must climb, is metaphysical, and the other, historical knowledge.

"They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws; and they must trace the laws of particular states, especially of their own, from the first rough sketches, to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced." (Stud. of Hist. p. 353. quarto edition.)

SECTION THE SECOND.

Of the Nature of Laws in general.

Note 1, page 39, line 9, word *sense*.—This perhaps is the only use in which the word *law* can be strictly used; for in all cases where it is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term may be found. When it is used to express the operations of the Deity or

Creator, it comprehends ideas very different from those which are included in its signification when it is applied to man, or his other creatures. The volitions of the Almighty are his laws, he had only to will *per verbum fiat*. When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find in every case, that with equal or greater propriety and perspicuity, we might have used the words *quality*, *property*, or *peculiarity*.—We say that it is a law of motion, that a body put in motion *in vacuo* must forever go forward in a straight line with the same velocity; that it is a law of nature, that particles of matter shall attract each other with a force that varies inversely as the square of the distance from each other; and mathematicians say, that a series of numbers observes a certain law, when each subsequent term bears a certain relation or proportion to the preceding term: but in all these instances we might as well have used the word *property* or *quality*, it being as much the property of all matter to move in a straight line, or to gravitate, as it is to be solid or extended; and when we say that it is the law of a series that each term is the square or square-root of the preceding term, we mean nothing more than that such is its property or peculiarity. And the word *law* is used in this sense in those cases only which are sanctioned by usage; as it would be thought a harsh expression to say, that it is a law that snow should be white, or that fire should burn. When a mechanic forms a clock, he establishes a model of it either in fact or in his mind, according to his pleasure; but if he should resolve that the wheels of his clock should move contrary to the usual rotation of similar pieces of mechanism, we could hardly with any propriety established by usage apply the term *law* to his scheme. When *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas, viz. disobedience and punishment.

Hooker, in the beginning of his Ecclesiastical Polity, like the learned judge, has with incomparable eloquence interpreted *law* in its most general and comprehensive sense. And most writers who treat *law* as a science, begin with such an explanation. But the Editor, though it may seem presumptuous to question such authority, has thought it his duty to suggest these few observations upon the signification of the word *law*.

Note 2; page 40, line 13, word *honestly*.—It is rather remarkable that both Harris, in his translation of Justinian's Institutes, and the learned Commentator, whose profound learning and elegant taste in the classics no one will question, should render in English, *honestè vivere*, to live honestly.—The language of the Institutes is far too pure to admit of that interpretation; and besides, our idea of honesty is fully conveyed by the words *sum cuique tribuere*. I should presume to think that *honestè vivere* signifies to live honourably, or with decorum, or *bienfiance*; and that this precept was intended to comprise that class of duties, of which the violations are ruinous to society, not by immediate but remote consequences, as drunkenness, debauchery, profaneness, extravagance, gaming, &c.

Note 3, page 41, line 17, word *this*.—Lord chief justice Hobart has also advanced, that even an act of parliament made against natural justice, as to make a man a judge in his own cause, is void in itself, for *jura nature sunt immutabilia*, and they are *leges legum*. (Hob. 87.) With deference to these high authorities, I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state. And if an act of parliament, if we could suppose such a case, should, like the edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the high authority by which it was ordained. The learned judge himself is also of this opinion in p. 91.

Note 4, page 43, line 12, word *nature*.—The law of nature, or morality, which teaches the duty towards one's neighbour, would scarce be wanted in a solitary state, where man is unconnected with man. A state of nature, to which the laws of nature, or of morals, more particularly refer, must signify the state of men when they associate together previous to, or independent of, the institutions of regular government. The ideal equality of men in such a state no more precludes the idea of a law, than the supposed equality of subjects in a republic.—The superior, who would prescribe and enforce the law in a state of nature, would be the collective force of the wife and good, as the superior in a perfect republic is a majority of the people, or the power to which the majority delegate their authority.

Note 5, page 44, line 14, word *wrong*.—Though the learned Judge treats this as a favourable definition, yet when it is examined, it will not perhaps appear so satisfactory, as the definition of civil or municipal law, or the law of the land, cited above from Justinian's Institutes; viz. *Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis*.

A municipal law is completely expressed by the first branch of the definition—"A rule of civil conduct prescribed by the supreme power in a state."—And the latter branch, "commanding what is right and prohibiting what is wrong," must either be superfluous, or convey a defective idea of a municipal law; for if right and wrong are referred to the municipal law itself, then, whatever it commands is right, and what it prohibits is wrong, and the clause would be insignificant tautology. But if right and wrong are to be referred to the law of nature, then the definition will become deficient or erroneous; for though the municipal law may seldom or never command what is wrong, yet in ten thousand instances it forbids what is right.—It forbids an unqualified person to kill a hare or a partridge; it forbids a man to exercise a trade without having served seven years as an apprentice; it forbids a man to keep a horse or a servant without paying the tax. Now all these acts were

perfectly right before the prohibition of the municipal law. The latter clause of this definition seems to have been taken from Cicero's definition of a law of nature, though perhaps it is there free from the objections here suggested, *Lex est summa ratio iusta à natura quæ jubet ea, quæ faciendæ sunt prohibetque contraria.* Cic. de Leg. lib. i. c. 6.

The description of law given by Demosthenes is perhaps the most perfect and satisfactory that can either be found or conceived : Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τὴν ἡμετέραν εὐρείαν, κοινὴν τῷ πρῶταγμα ἀπειλῇ, πᾶσιν ἴσων καὶ ὁμοίων, καὶ τῶν ἰσῶν νόμος, ὃ πάντας προσηκεῖ πείθεσθαι διὰ πολλὰ, καὶ μάλιστα, ὅτι πῶς ἴσῃ νόμος εὐσημα μὲν καὶ δῆρον δίκην, δόγμα δ' ἀνδράπων φροσύνην, ἐπαυρόμεθα δὲ τῶν ἐκνήσιον καὶ ἀκνήσιον ἀμαρτημάτων, πόλιον δὲ συνθήκῃ κοινῇ· καθ' ἣν πᾶσι προσηκεῖ ζῆντοίς ἐν τῇ πόλει. "The design and object of laws is to ascertain what is just, honourable, and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of laws, which, for various reasons, all are under an obligation to obey, but especially because all law is the invention and gift of Heaven, the sentiment of wise men, the correction of every offence, and the general compact of the state; to live in conformity with which is the duty of every individual in society." *Oiat. 1. cont. Aristogis.*

Note 6, page 46, line 37, see note, word *privilegia*.—An *ex post facto* law may be either of a public or of a private nature; and when we speak generally of an *ex post facto* law, we perhaps always mean a law which comprehends the whole community.

The Roman *privilegia* seem to correspond to our bills of attainder, and bills of pains and penalties, which, though in their nature they are *ex post facto* laws, yet are never called so.

Note 7, page 58, line 17, word *offence*.—This is a doctrine to which the Editor cannot subscribe. It is an important question, and deserves a more extensive discussion than can conveniently be introduced into a note. The solution of it may not only affect the quiet of the minds of conscientious men, but may be the foundation of arguments and decisions in every branch of the law. To form a true judgment upon this subject, it is necessary to take into consideration the nature of moral and positive laws. The principle of both is the same, viz. utility, or the general happiness and true interests of mankind.

Atque ipsa utilitas jussi-prope-mater et æqui.

But the necessity of one set of laws is seen prior to experience; of the other, posterior. A moral rule is such, that every man's reason (if not perverted) dictates it to him as soon as he associates with other men. It is universal, and must be the same in every part of the world. Do not kill, do not steal, do not violate promises, must be equally obligatory in England, Lapland, Turkey, and China. But a positive law is discovered by experience to be

useful and necessary only to men in certain districts, or under peculiar circumstances. It is said that it is a capital crime in Holland to kill a stork, because that animal destroys the vermin which would undermine the dykes or banks, upon which the existence of the country depends. This may be a wise law in Holland; but the life of a stork in England would be of no more value than that of a sparrow, and such a law would be useless and cruel in this country.

By the laws of nature and reason, every man is permitted to build his house in any manner he pleases; but from the experience of the destructive effects of fire in London, the legislature with great wisdom enacted that all party-walls should be of a certain thickness; and it is somewhat surprising that they did not extend this provident act to all other great towns. (14 Geo. 3. c. 78.)

It was also discovered by experience, that dreadful consequences ensued, when sea-faring people, who returned from distant countries infected with the plague, were permitted immediately to come on shore, and mix with the healthy inhabitants; it was therefore a wise and merciful law, though restrictive of natural right and liberty, which compelled such persons to be purified from all contagion by performing quarantine. (4 Vol. 161.)

He who, by the breach of these positive laws, introduces contagion and pestilence, is surely guilty of a much greater crime than he is who deprives another of his purse or his horse.

The laws against smuggling are entirely *juris positivi*; but the criminality of actions can only be measured by their consequences; and he who saves a sum of money by evading the payment of a tax, does exactly the same injury to society as he who steals so much from the treasury; and is therefore guilty of as great immorality, or as great an act of dishonesty. Or smuggling has been compared to that species of fraud which a man would practise who should join with his friends in ordering a dinner at a tavern, and after the festivity and gratifications of the day, should steal away, and leave his companions to pay his share of the reckoning.

Punishment or penalties are never intended as an equivalent or a composition for the commission of the offence; but they are that degree of pain or inconvenience, which are supposed to be sufficient to deter men from introducing that greater degree of inconvenience, which would result to the community from the general permission of that act, which the law prohibits. It is no recompense to a man's country for the consequences of an illegal act, that he should afterwards be whipped, or should stand in the pillory, or lie in a gaol. But in positive laws, as in moral rules, it is equally false that *omnia peccata paria sunt*. If there are laws such as the game-laws, which in the public opinion produce little benefit or no salutary effect to society, a conscientious man will feel perhaps no further regard for the observance of them, than from the consideration that his example may encourage others to violate those laws which are certainly beneficial to the community. Indeed, the last sentence of the learned Judge upon this subject, is an answer to his

own doctrine ; for the disobedience of any law in existence, must be presumed to involve in it either public mischief or private injury. It is related of Socrates, that he made a promise with himself to observe the laws of his country ; but this is nothing more than what every good man ought both to promise and perform : and he ought to promise still farther, that he will exert all his power to compel others to obey them. As the chief design of established government is the prevention of crimes and the enforcement of the moral duties of man, obedience to that government necessarily becomes one of the highest of moral obligations : and the principle of moral and positive laws being precisely the same, they become so blended, that the discrimination between them is frequently difficult or impracticable, or as the author of the Doctor and Student has expressed it with beautiful simplicity, " In every law positive well-made, is somewhat of the law of reason and of the law of God ; and to discern the law of God and the law of reason from the law positive, is very hard." 1 Dial. c. 4.

Note 8, page 59, line 5, word *guide*.—An unjust or slavish rescript may differ in its nature from such a constitution, but not in its authority ; for it is one of the fundamental rules of the civil law, *quodcumque imperator per epistolam constituit, vel cognoscens decrevit, vel edicto precepit legem esse constat*. See page 74.

Note 9, page 60, line 10, word *point*.—It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with a reference to each other ; that is, that what is clear in one statute, shall be called in aid to explain what is obscure and ambiguous in another.—Thus the last qualification act to kill game (22 & 23 Car. 2. c. 25) enacts, " that every person not having lands and tenements, or some other estate of inheritance, of the clear yearly value of 100*l.* or for life or having lease or leases of ninety-nine years of the clear yearly value of 150*l.*" (except certain persons) shall not be allowed to kill game. Upon this statute a doubt arose, whether the words *or for life* should be referred to the 100*l.* or to the 150*l.* *per annum*. The court of king's bench having looked into the former qualification acts, and having found that it was clear by the first qualification act, (13 R. 1. st. 1. c. 13.) that a layman should have 40*l.* a year, and a priest 10*l.* a year, and that by the 1 Ja. c. 27. the qualifications were clearly an estate of inheritance of 10*l.* a year, and an estate for life of 30*l.* a year, they presumed that it still was the intention of the legislature to make a yearly value of an estate for life greater than that of an estate of inheritance, though the same proportions were not preserved ; and thereupon decided, that clergymen, and all others possessed of a life estate only, must have 150*l.* a year to be qualified to kill game. *Lovander v. Lewis*, E. T. 22 Geo. 3.

The same rule to discover the intention of a testator is applied to wills, viz. the whole of a will shall be taken under consideration, in order to decypher the meaning of an obscure passage in it.

Note 10, page 61, line 15, word *preservation*.—See a very sensible chapter upon the interpretation of laws in general, in Rutherford's Institutes of Natural Law, b. 2. c. 7.

Note 11, page 61, line 34, word *permittit*.—The only equity, according to this description, which exists in our government, either resides in the king, who can prevent the *summum jus* from becoming *summa injuria*, by an absolute or a conditional pardon, or in juries, who determine whether any, or to what extent, damages shall be rendered. But equity as here explained, is by no means applicable to the court of chancery; for the learned Judge has elsewhere truly said, that "the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection." 3 Vol. 436.

SECTION THE THIRD.

Of the Laws of England.

Note 1, page 67, line 26, word *reach*.—What Lord Hale says is undoubtedly true, that "the original of the common law is as undiscoverable as the head of the Nile." Hist. Com. Law, 55.

Note 2, page 67, line 32, word *contrary*.—See note 10, p. 76.

Note 3, page 70, line 8, word *unjust*.—But it cannot be dissimulated that both in our law, and in all other laws, there are decisions drawn from established principles and maxims, which are good law, though such decisions may be both manifestly absurd and unjust. But notwithstanding this, they must be religiously adhered to by the judges in all courts, who are not to assume the characters of legislators. It is their province *jus dicere* and not *jus dare*. Lord Coke, in his enthusiastic fondness for the common law, goes farther than the learned Commentator; he lays down, that *argumentum ab inconvenienti plurimum valet in lege* because *nihil quod est inconveniens est licitum*. Mr. Hargrave's note upon this is well conceived and expressed: "Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly on an equipoise, ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist upon inconveniences; nor can it be true that nothing, which is inconvenient, is lawful, for that supposes in those who make laws a perfection, which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law." *Harg. Co. Lit.* 66.

Note 4, page 70, line 30, word *unjust*.—Precedents and rules must be followed even when they are flatly absurd and unjust, if they are agreeable to ancient principles. If an act of parliament is brought in at the close of a session, and passed on the last day, which makes an innocent act criminal, or even a capital crime;

and if no day is fixed for the commencement of its operation, it has the same efficacy as if it had been passed on the first day of the session, and all, who, during a long session, have been doing an act, which at the time was legal and inoffensive, will be liable to suffer the punishment prescribed by the statute. (4 *Inst.* 25. 4 *Term Rep.* 660.) This is both flatly absurd and unjust; but it is the clear law of England, and can only be abrogated by the united authority of the king, lords, and commons, in parliament assembled. Many other similar instances might be adduced.

Note 5, page 71 line 4, word *justice*.—But it is certainly repugnant to natural reason, where a father leaves two sons by two different mothers, and dies intestate, and a large estate descends to his eldest son, who dies a minor or intestate, that this estate should go to the lord of the manor or to the king, rather than to the younger son. When such a case happens in the family of a nobleman, or a man of great property, this law will then appear so absurd and unreasonable, that it will not be suffered to remain long afterwards to disgrace our books. See vol. ii. p. 231.

Note 6, page 74, line 9, word *legis*.—This is the first sentence of the definition of a constitution in the beginning of the Institutes. It ought to be cited at length, that it may receive the execration it deserves. It is no wonder from this specimen, that the civil law should have experienced such protection and patronage from all the despotic governments of Europe, and such opposition and detestation from the sturdy English barons.

CONSTITUTIO.

Sed et quod principi placuit, legis habet vigorem: quum lege regia, qua de ejus imperio lata est, populus ei, et in eum omne imperium suum et potestatem concedat. Quodcumque ergo imperator per epistolam constituit; vel cognoscens decrevit, vel edicto precepit, legem esse constat; hæc sunt, quæ constitutiones appellantur. Planè ex his quedam sunt personales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult, nam quod alicui ob meritum indulget, vel si quam penam irrogavit, vel si cui sine exemplo subvenit, personam non transgreditur. Aliæ autem, quum generales sint, omnes procul dubio tenent. Inst. 1, 2. 6.

Note 7, page 74, line 18, word *people*.—Lord chief justice Wilkes has said, "that the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing. (2 *Wil.* 348.) And statute law, and common law both originally flowed from the same fountain." (Ib. 350.) And to the same effect lord Hale declares, "that many of those things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record." (*Hist. Com. Law.* 66.) Though this is the probable origin of the greatest part of the common law, yet much of it certainly has been introduced by usage.

even of modern date, which general convenience has adopted. As in the civil law, *sine scripto jus venit, quod usus approbavit, nam diuturni mores, consensu utentium comprobati legem imitantur.* (Inst. 1, 2. 9.) Of this nature in this country is the law of the road, viz. that horses and carriages should pass each other on the whip hand. This law has not been enacted by statute, and is so modern, that perhaps this is the first time that it has been noticed in a book of law. But general convenience discovered the necessity of it, and our judges have so far confirmed it, as to declare frequently at nisi prius, that he who disregards this salutary rule is answerable in damages for all the consequences.

Note 8, page 75, line 35, word *est*.—The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder. But the expression has very unfortunately led merchants to suppose, that all their crude and new-fangled fashions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by our courts. Merchants ought to take their law from the courts, and not the courts from merchants: and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress. Merchants ought to be considered in no higher degree their own legislators or judges upon subjects of commerce than farmers or sportsmen in questions upon leases or the game laws. For the position of lord Coke ought never to be forgotten: "That the common law hath no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still, as Littleton saith." (*Co. Litt.* 115.) This is agreeable to the opinion of Mr. justice Foster, who maintains, that "the custom of merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determinations." 2 *Bur.* 1226.

Note 9, page 76, line 20, word *mouth*.—Sir James Burrow has reported the mode by which the recorder certifies the custom with such a degree of accuracy, as to specify which of his four gowns he shall wear upon the occasion. (1 *Bur.* 248.) When a custom has been once certified by the recorder, the judges will take notice of it, and will not suffer it to be certified a second time. (*Doug.* 365.) Lord Mansfield nonsuited the plaintiff in an action brought against the defendant on the custom of London, for calling the plaintiff a whore, the plaintiff not being able to prove the custom of inflicting a corporal punishment, by carting women of that description. But in the city court such an action is maintained, because they take notice of their own customs without proof. *Ibid.*

Note 10, page 76, line 32, words *beginning of it*.—If any one can shew the beginning of it within legal memory, that is, within any

time since the first year of the reign of Richard the first, it is no good custom.

Note 11, page 77, line 1, word *parliament*.—Therefore a custom that every pound of butter sold in a certain market should weigh 18 ounces, is bad, because it is directly contrary to 13 & 14 Car. II. c. 26, which directs, that every pound, throughout the kingdom, should contain 16 ounces. (3 T. R. 271.) But there could be no doubt, I conceive, but it would be a good custom to sell lumps of butter containing 18 ounces; for if it is lawful to sell a pound, it must be so to sell a pound and any aliquot part of one. The inconvenience and deception arise from calling that a pound in one place which is not a pound in another.

Note 12, page 78, line 13, word *potest*.—A custom, that poor housekeepers shall carry away rotten wood in a chafe is bad, being too vague and uncertain. 2 T. R. 758.

Note 13, page 78; line 36, word *strictly*.—This rule is founded upon the consideration, that a variety of customs in different places upon the same subject is a general inconvenience: the courts therefore will not admit such customs but upon the clearest proof. So where there is a custom that lands shall descend to the eldest sister, the courts will not extend this custom to the eldest niece, or to any other eldest female relation, but upon the same authority by which the custom between sisters is supported. 1 T. R. 466.

Note 14, page 83, line 27, word *them*.—Lord Hardwicke cites the opinion of lord Holt, and declares it is not denied by any one, that it is very plain all the clergy are bound by the canons confirmed by the king only, but they must be confirmed by the parliament to bind the laity. (2 Atk. 605.) Hence if the archbishop of Canterbury grants a dispensation to hold two livings distant from each other more than thirty miles, no advantage can be taken of it by lapse or otherwise in the temporal courts, for the restriction to thirty miles was introduced by a canon made since the 25 Hen. VIII. 2 Bl. Rep. 968.

Note 15, page 86, line 21, word *therein*.—This division is generally expressed by declaratory statutes, and statutes introductory of a new law. Remedial statutes are generally mentioned in contradistinction to penal statutes. See note 19. p. 88.

Note 16, page 87, line 73, word *statute*.—This statute against clipping the coin hardly corresponds with the general notion either of a remedial or an enlarging statute. In ordinary legal language remedial statutes are contradistinguished to penal statutes. An enlarging or an enabling statute is one which increases, not restrains the power of action; as the 32 Hen. VIII. c. 28, which gave bishops and all other sole ecclesiastical corporations, except parsons and vicars, a power of making leases, which they did not possess before, is always called an enabling statute. The 13 Eliz. c. 10. which afterwards limited that power, is on the contrary styled a restraining or disabling statute. See this fully explained by the learned Commentator. 2 Vol. p. 323.

Note 17, page 88, line 11, word *named*.—This construction must be presumed to be most conformable to the intention of the legislature.

Note 18, page 88, line 17, word *horse*.—Lord Hale thinks, that the scruple of the judges did not merely depend upon the words being in the plural number, because no doubt had ever occurred respecting former statutes in the plural number; as, for instance, it was enacted by the 32 Hen. VIII. c. 1. that no person convicted of burning any dwelling-houses should be admitted to clergy. But the reason of the difficulty in this case was, because the statute of 37 Hen. VIII. c. 8. was expressly penned in the singular number; *If any man do steal any horse, mare, or filly*; and then this statute thus varying the number, and at the same time expressly repealing all other ex-closures of clergy introduced since the beginning of Hen. VIII. it raised a doubt, whether it were not intended by the legislature to restore clergy where only one horse was stolen. 2 H. P. C. 365.

Note 19, page 88, line 29, word *frauds*.—These are generally called remedial statutes. And it is a fundamental rule of construction, that penal statutes shall be construed strictly, and remedial statutes shall be construed liberally. It was one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted in the construction of penal statutes: for whenever any ambiguity arises in a statute introducing a new penalty of punishment, the decision shall be on the side of lenity and mercy; or in favour of natural right and liberty: or, in other words, the decision shall be according to the strict letter in favour of the subject. And though the judges in such cases may frequently raise and solve difficulties contrary to the intention of the legislature, yet no further inconvenience can result, than that the law remains as it was before the statute. And it is more consonant to principles of liberty, that the judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity. But remedial statutes must be construed according to the spirit; for in giving relief against fraud, or in the furtherance and extension of natural right and justice, the judge may safely go beyond even that which existed in the minds of those who framed the law.

Note 20, page 88, line 36, word *transaction*.—And therefore it has been held, that the same words in a statute will bear different interpretations according to the nature of the suit or prosecution instituted upon them. As by the 9 Ann. c. 14. the statute against gaming; if any person shall lose at any time or sitting 10*l.* and shall pay it to the winner, he may recover it back within three months; and if the loser does not within that time, any other person may sue for it, and treble the value besides. So where an action was brought to recover back fourteen guineas, which had been won and paid after a continuance at play, except an interruption during dinner, the court held the statute was remedial, as far as it

prevented the effects of gaming, without inflicting a penalty, and therefore in this action, they considered it one time or sitting; but, they said, if an action had been brought by a common informer for the penalty, they would have construed it strictly in favour of the defendant, and would have held, that the money had been lost at two sittings. 2 Bl. Rep. 1226.

Note 21, page 91, line 5, word *void*.—If an act of parliament is clearly and unequivocally expressed, with all deference to the learned Commentator, I conceive it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. If the expression will admit of doubt, it will not then be presumed that that construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable; but where the signification of the statute is manifest, no authority less than that of parliament can restrain its operation.

SECTION THE FOURTH.

Of the Countries subject to the Laws of England.

Note 1, page 92, line 6, word *course*.—It cannot be said that the King's eldest son became prince of Wales by any necessary or natural consequence; but for the origin and creation of his title, see p. 231.

Note 2, page 94, line 9, word *statute*.—The learned Judge has made a mistake in referring to the statute, which is called the statute of Rutland, in the 10 Ed. 1. which does not at all relate to Wales. But the statute of Rutland, as it is called in *Vaughan* (p. 400.) is the same as the *Statutum Wallie*. Mr. Barrington, in his Observations on the Antient Statutes, (p. 74) tells us, that the *Statutum Wallie* bears date *apud Rothelanum*, what is now called Rhuydland in Flintshire. Though Edward says, that *terra Wallie prius regi jure feudali subiecta*, yet Mr. Barrington assures us, that the feudal law was then unknown in Wales, and that "there are at present in North Wales, and it is believed in South Wales, no copyhold tenures, and scarcely an instance of what we call manerial rights; but the property is entirely free and allodial. Edward, however, was a conqueror, and he had a right to make use of his own words in the preamble to his law." 16. 75.

Note 3, page 95, line 8, word *shires*.—By this union of Wales with England, twenty-seven members were added to the English house of commons. No county or town in Wales sends more than one member, except the county of Monmouth, which returns two.

Note 4, page 96, line 5, word *kingdoms*.—The laws in Scotland, concerning the tenures of land, and of consequence the constitution of parliaments and the royal prerogatives, were founded upon the same feudal principles as the laws respecting these subjects in England. It is said, that the feudal polity was established first in England; and was afterwards introduced into Scotland in imitation.

of the English government. But it continued in its original form much longer in Scotland than it did in England, and the changes in the Scotch government, perhaps owing to the circumstance that they are more recent, are far more distinctly marked and defined than they are in the history of the English constitution. And perhaps the progress of the Scotch parliament affords a clearer elucidation of the obscure and ambiguous points in the history of the representation and constitution of our country, than any arguments or authorities that have yet been adduced. But a particular discussion of this subject would far exceed the limits of a note, and will be reserved for a future occasion. But for an account of the parliament of Scotland before the union, and of the laws relative to the election of the representative peers and commoners of Scotland, I shall refer the studious reader to Mr. Wight's valuable *Inquiry into the Rise and Progress of Parliament chiefly in Scotland*. (Quarto ed.) It is supposed, that we owe the lower house of parliament in England, to the accidental circumstance that the barons and the representatives of the counties and boroughs had not a room large enough to contain them all; but in Scotland, the three estates assembled always in one house, had one common president, and deliberated jointly upon all matters that came before them, whether of a judicial or of a legislative nature. (Wight, 82.) In England the lords spiritual were always styled one of the three estates of the realm; but there is no authority that they ever voted in a body distinct from the lords temporal. In the Scotch parliament the three estates were, 1. The bishops, abbots, and other prelates who had a seat in parliament, as in England, on account of their benefices, or rather lands, which they held *in capite*, i. e. immediately of the crown: 2. The barons, and the commissioners of shires, who were the representatives of the smaller barons, or the free tenants of the king: 3. The burgesses, or the representatives of the royal boroughs. Craig assures us, *nihil ratum esse, nihil legis vim habere, nisi quod omnium trium ordinum consensu conjuncto constitutum est; ita tamen ut unus cujusque ordinis per se major pars consentiens pro toto ordine sufficiat. Scio hodie controversum, an duo ordines dissentiente tertio, quasi major pars leges condere possint; cujus partem negantem boni omnes, et quicumque de hac re scripserunt pertinacissime tuentur, alioqui duo ordines in eversionem tertii possint consentire.* (De Feudis, lib. i. Dieg. 7. f. 11.) But some writers have since presumed to controvert this doctrine. (Wight, 83.) It is strange that a great fundamental point, which was likely to occur frequently, should remain a subject of doubt and controversy. But we should now be inclined to think, that a majority of one of the estates could not have resisted a majority of each of the other two, as it cannot easily be supposed, that a majority of the spiritual lords would have consented to those statutes, which, from the year 1587 to the year 1690, were enacted for their impoverishment, and finally for their annihilation. At the time of the union, the Scotch parliament consisted only of the other two estates. With regard to laws concerning contracts and commerce, and perhaps also crimes, the law of Scotland is in a great degree

conformable to the civil law; and this, probably, was owing to their frequent alliances and connexions with France and the continent, where the civil law chiefly prevailed.

Note 5, page 96, line 24, figures 2,000,000*l.*—Accurately, 1,997,763*l.* 8*s.* 4*d.* the sum raised by a land tax of 4*s.* in the pound.

Note 6, page 96, line 39, word *commons*.—By the 25th article it is agreed that all laws and statutes in either kingdom, so far as they are contrary to these articles, shall cease and become void. From the time of Edw. IV. till the reign of Ch. II. both inclusive, our kings used frequently to grant, by their charter only, a right to unrepresented towns, of sending members to parliament. The last time this prerogative was exercised, was in the 29 Ch. II. who gave this privilege to Newark; and it is remarkable, that it was also the first time that the legality of this power was questioned in the house of commons, but it was then acknowledged by a majority of 125 to 73. (*Comm. Jour.* 21 March, 1676-7.) But notwithstanding it is a general rule in our law, that the king can never be deprived of his prerogatives, but by the clear and express words of an act of parliament; yet it has been thought, from this last article in the act of union, that this prerogative of the crown is virtually abrogated, as the exercise of it would necessarily destroy the proportion of the representatives for the two kingdoms. (See 1 Doug. El. Cases, 70. *The Preface to Glanv. Rep. and Simson's Law of Elect.* 91.) It was also agreed, that the mode of the election of the peers and commons should be settled by an act passed in the parliament of Scotland, which was afterwards recited, ratified, and made part of the act of union. And by that statute it was enacted, that of the 45 commons, 30 should be elected by the shires, and 15 by the boroughs; that the city of Edinburgh should elect one, and that the other royal boroughs should be divided into fourteen districts, and that each district should return one: and it was also provided, that no person should elect or be elected one of the 45, but who would have been capable of electing, or of being elected, a representative of a shire or a borough to the parliament of Scotland. Hence the eldest son of any Scotch peer cannot be elected one of the 45 representatives; for by the law of Scotland, prior to the union, the eldest son of a Scotch peer was incapable of sitting in the Scotch parliament. (*Wight*, 269.) There seems to be no satisfactory reason for this restriction, which would not equally extend to the exclusion of all the other sons of a peer.—Neither can such eldest son be entitled to be enrolled and vote as a freeholder for any commissioner of a shire, though otherwise qualified, as was lately determined by the house of lords, in the case of lord Daer, March 26, 1793. But the eldest sons of Scotch peers may represent any place in England, as many do. (2 *Hats. Prec.* 12.) The two statutes, 9 Ann. c. 5. and 33 G. II. c. 20. requiring knights of shires and members for boroughs to have respectively 600*l.* and 300*l.* a year, are expressly confined to England. But a commissioner of a shire must be a freeholder; and it is a general rule, that

that none can be elected, but those who can elect. (*Wight*, 289.) And till the contrary was determined by a committee of the house of commons in the case of Wigtown in 1775, (2 *Doug.* 181.) it was supposed, that it was necessary that every representative of a borough should be admitted a burghess of one of the boroughs which he represented. (*Wight*, 404.) It still holds generally true in shires in Scotland, that the qualifications of the electors and elected are the same; or that eligibility and a right to elect are convertible terms. Upon some future occasion I shall endeavour to prove, that, in the origin of representation, they were universally the same in England.

Note 7, page 97, line 5, word *peer*.—Since the union, the following orders have been made in the house of lords respecting the peerage of Scotland. Queen Anne, in the seventh year of her reign, had created James duke of Queensbury duke of Dover, with remainder in tail to his second son, then earl of Solway in Scotland; and upon the 21st of January 1708-9, it was resolved by the lords, that a peer of Scotland claiming to sit in the house of peers by virtue of a patent passed under the great seal of Great Britain, and who now sits in the parliament of Great Britain, had no right to vote in the election of the sixteen peers who are to represent the peers of Scotland in parliament.

The duke of Hamilton having been created duke of Brandon, it was resolved by the lords on the 20th of December 1711, that no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the union, should entitle him to sit in parliament. Notwithstanding this resolution gave great offence to the Scotch peerage, and to the queen and her ministry, yet a few years afterwards, when the duke of Dover died, leaving the earl of Solway, the next in remainder, an infant, who, upon his coming of age, petitioned the king for a writ of summons as Duke of Dover; the question was again argued on the 18th of December 1719, and the claim as before disallowed. (See the argument, 1 *P. Wms.* 582.) But in 1782 the duke of Hamilton claimed to sit as duke of Brandon, and the question being referred to the judges, they were unanimously of opinion, that the peers of Scotland are not disabled from receiving, subsequently to the union, a patent of peerage of Great Britain, with all the privileges usually incident thereto. Upon which the lords certified to the king, that the writ of summons ought to be allowed to the duke of Brandon, who now enjoys a seat as a British peer. (6th June, 1782.) But there never was any objection to an English peer's taking a Scotch peerage by descent; and therefore, before the last decision, when it was wished to confer an English title upon a noble family of Scotland, the eldest son of the Scotch peer was created in his father's life-time an English peer, and this creation was not affected by the annexation by inheritance of the Scotch peerage. On the 13th February 1787, it was resolved, that the earl of Abercorn and the duke of Queensbury, who had been

chosen of the number of the sixteen peers of Scotland, having been created peers of Great Britain, thereby ceased to sit in that house as representative of the peerage. See the argument in *Ann. Reg.* for 1787, p. 95. At the election occasioned by the last resolution, the dukes of Queensbury and Gordon had given their votes as peers of Scotland contrary to the resolution of 1709; in consequence of which it was resolved 18th May, 1787, that a copy of that resolution should be transmitted to the lord register of Scotland as a rule for his future proceeding in cases of election.

The duke of Queensbury and marquis of Abercorn had tendered their votes at the last general election, and their votes were rejected; but notwithstanding the former resolutions, on 23d May, 1793, it was resolved, that if duly tendered they ought to have been counted. One may venture to say, that some of these resolutions must necessarily have arisen from a misconstruction of the statute of union, or a misconception in the peers of the true principles of their own authority and jurisdiction.

Note 8, page 98, line 19, word *Scotland*.—Acts of parliament in general passed since the union, extend to Scotland; but where a statute is not applicable to Scotland, and where Scotland is not intended to be included, the method is to declare by *proviso* that it does not extend to Scotland. 3 *Burr.* 853.

Note 9, page 99, line 34, word *Northumberland*.—See the case of the King v. Cowie, in 2 *Burr.* 834, in which lord Mansfield seems to have collected and methodized all the learning respecting the constitution of the town of Berwick upon Tweed.

Note 10, page 100, line 3, word *assumed*.—The title of the king was conferred upon him and his successors by a statute passed in Ireland expressly for that purpose, and it was made treason for any inhabitant of Ireland to deny it. 33 *Hen. VIII. c. 1. Irish Stat.*

Note 11, page 101, line 27, word *them*.—Lord Coke citing this in Calvin's case, 7 Co. 22, inserts this parenthesis, *viz.* "(which is to be understood unless specially named.)"

Note 12, page 103, line 4, word *houses*.—The history of the proceedings of the Irish parliament, lately published by Lord Mountmorres is a very valuable accession to constitutional learning. It is a publication, which, besides being immediately useful to Ireland, affords much important information to those who are desirous of having a well-grounded and an accurate knowledge of the English constitution; for the public proceedings of the neighbouring kingdoms of Scotland and Ireland may furnish strong arguments from analogy, when difficult questions arise in our government, and they are sometimes irrefragable evidence of ancient principles which were once common to them all. It is probable that the journals of the Scotch parliament would still be found a rich mine of constitutional and legal information. Works of that kind ought to be printed at the charge of the nation; for though they are of great value to the public, yet they do not yield a sufficient portion of profit or fame to induce individuals to take upon themselves the

labour and expense. It is much to be lamented that the journals of the English house of lords have not yet been digested and reduced into order by an index.

Lord Mountmorres observes upon the statute referred to by the learned judge, that to repeal Poynings' law it required the consent of *the greater number of the lords and commons*, which, if it meant any thing, must signify a majority not of those who happened to be present, but of the whole number summoned to parliament; and that the requisition in that sense was strictly complied with in 1712, when Poynings' law was repealed. 1 Vol. p. 53.

I shall here take the liberty to subjoin an extract from what lord Mountmorres calls "a short view of the former, and of the present method of passing laws and of holding parliaments in Ireland," as it contains a clearer and more authentic account than I could elsewhere collect:

"Before a parliament was held, it was expedient, antecedent to one thousand seven hundred and eighty-two, that the lord lieutenant and council should send over an important bill as a reason for summoning that assembly. This always created violent disputes, and it was constantly rejected; as a money bill, which originated in the council, was contrary to a known maxim, that the commons hold the purse of the nation; and as all grants originate from them; since, in early times, they were used to consult with their constituents upon the mode, duration, and quantum of the supply.

"Propositions for laws, or heads of bills, as they are called, originated indifferently in either house. After two readings and a committal, they were sent by the council to England, and were submitted, usually by the English privy council, to the attorney and solicitor general; and from thence they were returned to the council of Ireland, from whence they were sent to the commons, if they originated there, (if not to the lords,) and after three readings they were sent up to the house of Lords, where they went through the same stages; and then the lord lieutenant gave the royal assent in the same form which is observed in Great Britain.

"In all these stages in England and Ireland, it is to be remembered, that any bill was liable to be rejected, amended or altered; but that when they had passed the great seal of England, no alteration could be made by the Irish parliament.

"At present, by the chief baron Yelverton's law, it is not necessary for the council to certify a bill under the great seal of Ireland, as a reason for summoning a parliament, but it is ordered to be convoked by proclamation from the crown, as it is summoned in England.

"Touching bills, they now originate in either house, and go from one to the other, as they do in England; after which, they are deposited in the lords' office, when the clerk of the crown takes a copy of them, and this parchment is attested to be a true copy, by the great seal of Ireland on the left side of the instrument.

" Thus they are sent to England by the Irish council, and if they are approved of by the king, this transmits, or copy, comes back with the great seal of England on the right side, with a commission to the lord lieutenant to give the royal assent. All bills, except money bills, remain in the lords' office; but bills of supply are sent back to the house of commons to be presented by the speaker at the bar of the lords for the royal assent. Hence it is manifest, that no alteration can now be made in bills, except in parliament, as the record or original roll, remains in the lords' office till it obtains the royal assent.

" Of the rejection of bills, or not returning them from England, it is said there are very few instances of such a refusal by the crown since one thousand seven hundred and eighty-two; though, doubtless, the royal negative in both kingdoms is as clear a privilege as any other prerogative." 1 Vol. 57.

Note 13, page 104, line 5, word *Ireland*.—Prynne in his learned argument has enumerated several statutes made in England from the time of king John, by which Ireland was bound. (8 St. Tr. 343.) That was an argument to prove that lord Connor Maguire, baron of Inneskillin in Ireland, who had committed treason in that country, by being the principal contriver and instigator of the Irish rebellion and massacre in the time of Car. I. and who had been brought to England against his will, could be lawfully tried for it in the king's bench at Westminster by a Middlesex jury, and be ousted of his trial by his peers in Ireland, by force of the statute of 35 Hen. VIII. c. 2.

The prisoner having pleaded to the jurisdiction, the court, after hearing this argument, over-ruled the plea, and the decision was approved of by a resolution of the two houses of parliament, and lord Maguire was found guilty, and was afterwards executed at Tyburn as a traitor.

Note 14, page 104, line 17, word *whatsoever*.—By an act passed in the 22 Geo. III. c. 53. the statute of Geo. I. is simply repealed. But as the statute of Geo. I. was thought to be merely declaratory of the former law, the repeal of it could produce no further operation than to render the law in some degree less clear than that statute had made it. Therefore to produce the intended effect, it required another statute which was passed in the 23 Geo. III. c. 28. which expressly declared that in all cases whatever the people of Ireland should be bound only by laws enacted by his majesty and the parliament of that kingdom; and that no appeal or writ of error from any court in Ireland should for the future be brought into any of the courts in England. This latter provision is in some degree a natural consequence of the former, otherwise the privation of the benefit of the learning and impartiality of our judges and house of lords might be considered as a real and substantial advantage lost by grasping at liberty and independence, which are often, as in this instance, a mere shadow and a name.

Note 15, page 107, line 15, words 5 *Geo. III. c. 26 and 39.*—c. 26. is called the vesting act, and c. 39. the regulating act.

Note 16, page 108, line 36, word *laws*.—See an elaborate and learned argument by lord Mansfield to prove the king's legislative authority by his prerogative alone over a ceded conquered country. *Corwp. 204.*

Note 17, page 110, line 25, word *statutes*.—By 22 *Geo. III. c. 46.* his majesty was empowered to conclude a truce or peace with the colonies or plantations in America, and by his letters patent to suspend or repeal any acts of parliament which related to those colonies. And by the first article of the definitive treaty of peace and friendship between his Britannic majesty and the United States of America, signed at Paris the 3d day of September, 1783, his Britannic majesty acknowledges the United States of America to be free, sovereign, and independent States. (*Ann. Regist. 1783, State Papers.*) And 23 *Geo. III. c. 39.* gives his majesty certain powers for the better carrying on trade and commerce between England and the United States.

Note 18, page 113, line 1, words *diocese does now*.—When the *diocchia*, or the district over which the bishop exercised his spiritual functions, was divided into lesser portions for the superintendence of his clergy, a word of similar import was adopted, *parochia*. And in ancient times, Mr. Selden thinks, the words were used indiscriminately. *Burn. Ec. L. 59.*

Note 19, page 114, line 16, words *one parish*.—But at present the boundaries of the one afford no evidence or inference whatever of the boundaries of the other.

Note 20, page 115, line 31, word *vills*.—In the 13 and 14 *Car. 2. c. 12.* which provides that when a parish is so large that it cannot have the benefit of the overseers and provision for the poor appointed by the 43 *Eliz. c. 2.* two overseers may be appointed for every township or village in such parish. In this statute the words *township* and *village* have always been thought synonymous. But it has been held that wherever there is a constable, there is a township. (1 *T. R. 376.*) Parishes in some counties, as in part of Bedfordshire, are divided into tithings. (2 *Luders, 511.*)

Note 21, page 116, line 7, word *Westminster*.—Westminster was one of the new bishopricks created by Henry VIII. out of the revenues of the dissolved monasteries. (2 *Burn. E. L. 78.*) Thomas Thirlby was the only bishop that ever filled that see: (*Godw. Comm. de Praef. 570.*) he surrendered the bishoprick to Ed. VI. 30 March, 1550, and on the same day it was dissolved and added again to the bishoprick of London. (*Rym. foed. 15. tom. p. 222.*) Queen Mary, afterwards filled the church with Benedictine monks, and Eliz. by authority of parliament, turned it into a collegiate church subject to a dean; but it retained the name of city, not perhaps because it had been a bishop's see, but because, in the letters patent erecting it into a bishoprick, king Henry declared, *volumus itaque et per*

presentes ordinamus quod ecclesia cathedralis et sedes episcopalis, ac quod tota villa nostra Westmonasterii sit civitas, ipsamque civitatem Westmonasterii vocari et nominari volumus et decernimus. There was a similar clause in favour of the other five new created cities, viz. Chester, Peterborough, Oxford, Gloucester, and Bristol. The charter for Chester is in *Gibf. Cod.* 1449; and that for Oxford in *Rym. Feod.* 14 tom. 754. Lord Coke seems anxious to rank Cambridge among the cities, because he finds it called *civitas* in an ancient record, which he "thought it good to mention in remembrance of his love and "duty, *almae matri academie Cantabrigie.*" (*Co. Litt.* 109.) The present learned Vinerian professor of Oxford has produced a decisive authority that cities and bishops' sees had not originally any necessary connexion with each other.—It is that of Ingulphus, who relates that at the great council assembled in 1072, to settle the claim of precedence between the two archbishops, it was decreed that bishops' sees should be transferred from towns to cities. (*1 Wood.* 302.) In *Will. Malm. Scrip. Ang.* p. 214. it is *concessum est episcopis de villis transire in civitates.*

The accidental coincidence of the same number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect. It is certainly (as Mr. Wooddeffon observes) a strong confirmation of this authority, that the same distinction is not paid to bishops' sees in Ireland.—Mr. Hargrave in his notes to *Co. Litt.* 110. proves, that, although Westminster is a city, and has sent citizens to parliament since the time of Ed. VI. it never was incorporated; and this is a striking instance in contradiction of the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation.

Note 22, page 117, line 6, word *wapentakes*.—*Et quod Angli vocant hundredum, comitatus Yorksbire, Lincolnsbire, Nottinghamsbire, Leicesersbire, et Northamptonfbire, vacant wapentachium* (*Ll. Edw. c. 33.*) And it proceeds to explain why they are called so, viz. because the people at a public meeting confirmed their union with the governor by touching his weapon or lance.

Note 23, page 122, line 4, word *others*.—3 Geo. I. c. 5. for the regulation of the office of sheriffs, enumerates twelve cities, and five towns, which are counties of themselves, and which have consequently their own sheriffs. The cities are London, Chester, Bristol, Coventry, Canterbury, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester, York. The towns are, Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Pool, Southampton.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER THE FIRST.

Of the absolute Rights of Individuals.

Note 1, page 124, line 34, word *punishment*.—The distinction between *private wrongs* and *public wrongs* is more intelligible, and more accurately limited by the nature of the subjects, than the distinction between *the rights of things*, and *the rights of persons*: for all rights whatever must be the rights of certain persons to certain things. Every right is annexed to a certain character or relation, which each individual bears in society. The rights of kings, lords, judges, husbands, fathers, heirs, purchasers, and occupants are all dependent upon the respective characters of the claimants. These rights might again be divided into rights to possess certain things, and the rights to do certain actions. This latter class of rights constitute powers and authority. But the distinction of *rights of persons* and *rights of things* in the first two volumes of the Commentaries, seems to have no other difference than the antithesis of the expression, and that too resting upon a solecism; for the expression, rights of things, or a right of a horse, is contrary to the idiom of the English language: we say, invariably, *a right to a thing*. The distinction by the learned Judge, in the first two volumes, appears, in a great degree, to be that of the rights of persons in public stations, and the rights of persons in private relations. But as the order of legal subjects is, in a great measure, arbitrary, and does not admit of that mathematical arrangement, where one proposition generates another, it perhaps would be difficult to discover any method more satisfactory, than that which the learned Judge has pursued, and which was first suggested by lord C. J. Hale. See *Hale's Analysis of the Law*.

Note 2, page 126, line 19, word *sanction*.—This distinction seems to convey a doctrine that can hardly bear examination, or be reconciled with sound law and morality. The circumstance of publication as evidence of shameful profligacy and hardened depravity, may alter the nature of the punishment, but cannot alter the intrinsic criminality of a vicious act. Whatever is pernicious to society as an example, must necessarily be vicious and destructive in itself. What is ruinous and criminal to repeat and follow, must also be ruinous and criminal to commence. Human laws prohibit every where the guilty action, but punishment can only be the consequence of detection.

Note 3, page 128, line 37, word *restraint*.—This section is one of the very few intelligible descriptions of liberty, which have hith-

erto been communicated to the world. Though declamation and eloquence in all ages have exhausted their stores upon this favourite theme, yet reason has made so little progress in ascertaining the nature and boundaries of liberty, that there are very few authors indeed, either of this or of any other country, which can furnish the studious and serious reader with a clear and consistent account of this idol of mankind. Thousands worship it, and are even ready to offer their blood as a sacrifice to it, under the form of a tree, a cap, or a cockade. These foolish symbols, with various watchwords of sedition equally unmeaning, may enflame the passions of the vulgar for a time, when practised upon by all the artifices of deligning and wicked men, and may drown the voice of reason and sobriety, but the consequences are too terrible to last long. Anarchy must reform itself, or in a country where every crime is committed, and where neither life, person, nor property is secure, in such a war of all against all, each for his own sake will soon demand a truce, and offer articles of capitulation.

A more extensive discussion of this subject will be reserved for a future occasion, when I shall endeavour to prove that Englishmen at present possess every species of liberty in a higher degree than ever was enjoyed in any other country, and even in a degree unknown to their ancestors. But I shall here briefly subjoin the different notions conveyed by the word *liberty*, which even by the most eminent writers and orators are generally confounded together.

The *libertas quidlibet faciendi*, or the liberty of doing every thing which a man's passions urge him to attempt, or his strength enables him to effect, is savage ferocity; it is the liberty of a tyger and not the liberty of a man.

"Moral or natural liberty (in the words of Burlamaqui, ch. 3. §. 15.) is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not any way abuse it to the prejudice of any other men."

This is frequently confounded, and even by the learned Judge in this very section, with savage liberty.

Civil liberty is well defined by our author to be "that of a member of society, and is no other than *natural liberty* so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

Mr. Paley begins his excellent chapter upon civil liberty with the following definition: "Civil liberty is the not being restrained by any law, but what conduces in a greater degree to the public welfare." B. vi. c. 5.

The archbishop of York has defined "civil or legal liberty to be that which consists in a freedom from all restraints except such as established law imposes for the good of the community, to which the partial good of each individual is obliged to give place."—(A sermon preached Feb. 21, 1777, p. 19.)

All these three definitions of civil liberty are clear, distinct, and rational, and it is probable they were intended to convey exactly the same ideas; but I am inclined to think that the definition given by the learned Judge is the most perfect, as there are many restraints by natural law, which, though the established law does not enforce, yet it does not vacate and remove.

In the definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.

Political liberty may be defined to be the security with which, from the constitution, form, and nature of the established government, the subjects enjoy civil liberty. No ideas or definitions are more distinguishable than those of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name.—The learned Judge uses political and civil liberty indiscriminately; but it would perhaps be convenient uniformly to use those terms in the respective senses here suggested, or to have some fixed specific denominations of ideas, which in their nature are so widely different.—The last species of liberty has probably more than the rest engaged the attention of mankind, and particularly of the people of England. Civil liberty, which is nothing more than the impartial administration of equal and expedient laws, they have long enjoyed nearly to as great an extent, as can be expected under any human establishment.

But some who are zealous to perpetuate these inestimable blessings of civil liberty, fancy that our political liberty may be augmented by reforms, or what they deem improvements in the constitution of the government. Men of such opinions and dispositions there will be, and perhaps it is to be wished that there should be, in all times. But before any serious experiment is made, we ought to be convinced by little less than mathematical demonstration, that we shall not sacrifice substance to form, the end to the means, or exchange present possession for future prospects. It is true, that civil liberty may exist in perfection under an absolute monarch, according to the well-known verse:

*Fallitur egregio quisquis sub principe credit
Servitium. Libertas nunquam gratior extat
Quam sub rege pio.*

CLAUD.

But what security can the subjects have for the virtues of his successor? Civil liberty can only be secure where the king has no power to do wrong, yet all the prerogatives to do good. Under such a king, with two houses of parliament, the people of England have a firm reliance that they will retain and transmit the blessings of civil and political liberty to the latest posterity.

There is another common notion of liberty, which is nothing more than a freedom from confinement. This is a part of civil liberty, but it being the most important part, as a man in a gaol can have the exercise and enjoyment of few rights, it is *à l'extrême* called liberty.

But where imprisonment is necessary for the ends of public justice, or the safety of the community, it is perfectly consistent with civil liberty. For Mr. Paley has well observed that, "it is not the rigour, but the inexpediency of laws and acts of authority, which makes them tyrannical." (B. vi. c. 5.)

This is agreeable to that notion of civil liberty entertained by Tacitus, one who was well acquainted with the principles of human nature and human governments, when he says, *Gethor's regnantur paulò jam adductius, quam cetera Germanorum gentes, nondum tamen supra libertatem.* De Mor. Ger. c. 43.

It is very surprising that the learned Commentator should cite with approbation (p. 6. and 125.) and that Montelquieu should adopt (b. xi. c. 13.) that absurd definition of liberty given in Justinian's Institutes, *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* In every country, and under all circumstances, the subjects possess the liberty described by this definition.

When an innocent negro is seized and chained, or is driven to his daily toil by a merciless master, he still retains this species of liberty, or that little power of action, of which force and barbarous laws have not bereft him. But we must not have recourse to a system of laws, in which it is a fundamental principle, *quod principi placuit, legis habet vigorem*, for correct notions of liberty.

So far the Editor thought it proper to suggest to the student the different significations of the word *liberty*; a word which it is of the utmost importance to mankind that they should clearly comprehend; for though a genuine spirit of liberty is the noblest principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falsò libertatis vocabulum obtenti ab iis, qui privatus degeneres, in publicum exitiosi nihil spei, nisi per discordias habuunt.* (Tac. xi Ann. c. 17.) And the first sentence of our Hooker's Ecclesiastical Polity contains not less truth and eloquence: "He that goeth about to persuade a multitude, that they are not so well governed as they ought to be, shall never want attentive and favourable hearers."

This subject will be resumed upon a future occasion, and will be elucidated by various instances, particularly from the laws and constitution of this country; and the Editor cannot but cherish even a confident hope, that they who acquire the most intimate acquaintance with those laws and that constitution, will always be the most convinced, that to be free, is to live in a country where the laws are just, expedient, and impartially administered, and where the subjects have perfect security that they will ever continue so; and, allowing for some slight and perhaps inevitable imperfections, that to be free, is to be born and to live under the English constitution. *Hanc retinete, quæso, Quirites, quam vobis tanquam hereditatem, majores vestri reliquerunt.* Cic. 4. Phil.

Note 4, page 129, line 16, word *continue*.—It is not to the soil or to the air of England that negroes are indebted for their liberty,

but to the efficacy of the writ of *habeas corpus*, which can only be executed by the sheriff in an English county.—I do not see how the master's right to the service can *possibly* continue ; it can only arise from a contract, which the negro in a state of slavery is incapable of entering into with his master. See page 451.

Note 5, page 129, line 26, words *none at all*.—Lord Camden concluded his judgment in the case of general warrants in the same words : " One word more for ourselves ; we are no advocates for " libels ; all governments must set their faces against them, and " whenever they come before us and a jury, we shall set our faces " against them ; and if juries do not prevent them, they may " prove fatal to liberty, destroy government, and introduce an- " archy ; but tyranny is better than anarchy, and the worst govern- " ment better than none at all." 2 *Willf.* 292.

Note 6, page 130, line 4, word *England*.—See a fuller account of Magna Charta, 4 vol. p. 424.

Note 7, page 131, line 35, word *murder*.—The distinction between murder and manslaughter or felonious homicide, in the time of Bracton, was in a great degree nominal. The punishment of both was the same ; for murder as well as manslaughter, by the common law, had the benefit of clergy. *Fest.* 302.

Note 8, page 132, line 1, words *atrocious a light*.—But if the child be born alive, and afterwards die in consequence of the potion or beating, it will be murder (3 *Inst.* 50. 1 *P. Wms.* 245.) ; and of course those who, with a wicked intent, administered the potion, or advised the woman to take it, will be accessaries before the fact, and subject to the same punishment as the principal.

Note 9, page 132, line 9, words *actually born*.—It may have a distributive share of intestate property even with the half blood. (1 *Ves.* 81.) : it is capable of taking a devise of land (2 *Atk.* 117. 1 *Freem.* 244. 293.) : it takes under a marriage settlement, a provision made for children living at the death of the father (1 *Ves.* 85.) And it has lately been decided, that marriage, and the birth of a posthumous child, amount to a revocation of a will executed previous to the marriage. (5 *T. R.* 49.) It takes land by descent, though in that case, the presumptive heir may enter and receive the profits for his own use till the birth of the child (3 *Willf.* 526.), which seems to be the only interest it loses by its situation. See also 2 vol. 172.

Note 10, page 133, line 18, words *or limb*.—See 4 vol. 30.

Note 11, page 135, line 8, words 21 *Jac. I. chap. 28*.—One species of civil death may still exist in this country ; that is, where a man by act of parliament is attainted of treason or felony, and, saving his life, is banished for ever ; this lord Coke declares to be a civil death. But he says a temporary exile is not a civil death. *Co. Litt.* 133. And for the same reason where a man receives judgment of death, afterwards leaves the kingdom for life, upon a conditional pardon, this seems to amount to a civil death : this prac-

tice did not exist in the time of lord Coke, who says, that a man can only lose his country by authority of parliament. *Id.*

Note 12, page 135, line 32, word *necessity*.—This is a compliment which, I fear, the common law does not deserve; for although it did not punish with death any person who could read, even for any number of murders or other felonies, yet it inflicted death upon every felon who could not read, though his crime was the stealing only of twelve-pence farthing.

Note 13, page 139, line 28, word *regnum*.—See p. 276.

Note 14, page 139, line 39, words *act of parliament*.—It is said that exile was first introduced as a punishment by the legislature in the 39th year of Eliz. when a statute enacted that "such rogues as were dangerous to the inferior people should be banished the realm;" (39 Eliz. c. 4. See *Barr. Ant. Stat.* 269.) and that the first statute in which the word transportation is used in the 18th C. H. c. 3. which gives a power to the judges at their discretion either to execute or transport to America for life, the Mole-troopers of Cumberland and Northumberland, (2 Woodd. 498.) a law which very unnecessarily was continued till the 31 Geo. II. c. 42. and then made perpetual. This perhaps is the only instance in which the legislature has extended the term of transportation beyond fourteen years. But to persons capitally convicted the king frequently offers a pardon upon condition of their being transported for life. Many have at first rejected this gracious offer, and there have been one or two instances of persons so desperate as to persist in the refusal, and who in consequence suffered the execution of their sentence.

Note 15, page 142, line 4, word *perform*.—But by the last highway act (13 Geo. III. c. 78.) two justices may either widen or divert any highway through or over any person's soil, even without his consent, so that the new way shall not be more than thirty feet wide, and that they pull down no building, nor take away the ground of any garden, park, or yard. But the surveyor shall offer the owner of the soil, over which the new way is carried, a reasonable compensation, which if he refuses to accept, the justices shall certify their proceedings to some general quarter sessions, and the surveyor shall give fourteen days notice to the owner of the soil of an intention to apply to the sessions; and the justices of the sessions shall impanel a jury, who shall assess the damages, which the owner of the soil has sustained, provided that they do not amount to more than forty years purchase. And the owner of the soil shall still be entitled to all the mines within the soil, which can be got without breaking the surface of the highway.

Note 16, page 145, line 30, words *grand jury*.—Either at the assizes or quarter sessions. The punishment for offending against this act not to exceed a fine of 100*l.* and imprisonment for three months. Upon the trial of lord George Gordon, lord Mansfield and the court declared, that they were clearly of opinion that this statute was not in any degree affected by the bill of rights. 1 *W. & M. ft. 2. c. 2. Doug.* 571.

CHAPTER THE SECOND.

Of the Parliament.

Note 1, page 149, line 15, words 12th century.—The word *parliamentum* was not used in England till the reign of Hen. III. (*Pryn. on 4 Inst.* 2.) Sir Henry Spelman in his Glossary (*voc. Parl.*) says, "*Johannes rex haud dicam parliamentum, nam hoc nomen non tum emicuit, sed communis concilii regni formam et coactionem perspicuam dedit.*"

It was from the use of the word *parliamentum* that Prynne discovered lord Coke's manuscript, *Modus tenendi parliamentum tempore regis Edwardi, filii regis Etheldredi, &c.* to be spurious. Lord Coke set a high value upon it, and has assured us, "that certain it is, this *modus* was rehearsed and declared before the conqueror at the conquest, and by him approved." (*4 Inst.* 12.) But for many reigns after this word was introduced, it was indiscriminately applied to a session and to the duration of the writ of summons; we now confine it to the latter; viz. to the period between the meeting after the return of the writ of summons and the dissolution. Etymology is not always frivolous pedantry; it sometimes may afford an useful comment upon the original signification of a word. No inconsiderable pains have been bestowed by learned men in analysing the word *parliament*; though the following specimens will serve rather to amuse than to instruct: "The word 'parliament,' saith one, 'is compounded of *parium lamentum*; 'because (as he thinks) the peers of the realm did at these assemblies lament and complain each to the other of the enormities of the country, and thereupon provided redress for the same." (*Lamb. Arch.* 235.) Whitelocke, in his notes (174.) declares, "that this derivation of parliament is a sad etymology." Lord Coke and many others say, that "it is called parliament because 'every member of that court should sincerely and discreetly '*parler*lament, speak his mind for the general good of the commonwealth." (*Co. Litt.* 110.) Mr. Lambard informs us, that "Lawrence Vallo misliketh this derivation." (*Arch.* 236.) And Lawrence Vallo is not singular; for Mr. Barrington assures us, that "lord Coke's etymology of the word parliament from speaking one's mind has been long exploded. If one might presume (adds he) to substitute another in its room after so many guesses by others, I should suppose it was a compound of the two Celtic words *parly* and *ment*, or *mend*. Both these words are to be found in Bullet's Celtic Dictionary published at Besançon in 1754. 3d vol. fol. He renders *parly* by the French infinitive *parler*; and we use the word in England as a substantive, viz. *parley*; *ment* or *mend* is rendered *quantité*, *abondance*. The word parliament therefore being resolved into its constituent syllables, may not improperly be said to signify what the Indians of North America call a Great Talk." I shall leave it to the reader to determine which of these derivations is most descriptive of a parliament;

and perhaps after so much recondite learning it may appear presumptuous in me to observe, that parliament imported originally nothing more than a council or conference; and that *ment* in parliament has no more signification than it has in impeachment, engagement, imprisonment, hereditament, and ten thousand others of the same nature, though the civilians have adopted a similar derivation, viz. testament from *testari mentem*. Tay. Civ. Law. 70.

Note 2, page 151, line 27, word *parliament*.—The origin and progress of parliaments and our constitution will be discussed at large in the supplemental volume.

Note 3, page 152, line 2, words *to sit*.—This is a provision of the magna charta of king John: *faciemus summoneri, &c. ad certum diem scilicet ad terminum quadraginta dierum ad minus et ad certum locum*. (Black Mag. Ch. Joh. 14.) It is enforced by 7 & 8 W. c. 25, which enacts that there shall be forty days between the teste and the return of the writ of summons; and this time is by the uniform practice since the union extended to fifty days. (2 Hats. 235.) This practice was introduced by the 22d article of the act of union, which required that time between the teste and the return of the writ of summons for the first parliament of Great Britain.

Note 4, page 152, line 31, words *the crown*.—See p. 192.

Note 5, page 153, line 35, words *nice a scruple*.—William Drake, a merchant of London, was impeached for writing a pamphlet intitled, *The Long Parliament received*, in which he maintained, that there could be no legislative authority till that was legally and regularly dissolved by the king and the two houses of parliament, according to the 16 Car. I. c. 7. *Com. Jour.* 20 Nov. 1660.

Note 6, page 155, line 6, words *if need be*.—Mr. Granville Sharp, in a treatise published some years ago, argued ingeniously against this construction of the 4 Ed. III. and maintained that the words, *if need be*, referred only to the preceding word, *oftener*. So that the true signification was, that a parliament should be held once every year at all events; and if there should be any need to hold it oftener, then more than once. (See his Declaration, &c. p. 166.) The cotemporary records of parliament, in some of which it is so expressed without any ambiguity, prove beyond all controversy that this is the true construction. In ancient times many favourite laws were frequently re-enacted. In the 50 Ed. III. it is expressly and absolutely declared, that a parliament should be held once a year. *Rot. Parl.* No. 186. In the 1 R. II. we find again another petition from the commons, that a parliament should be held once a year at the least; "*Que plese a n^{re} dit S^r de tenir parlement un foiz par an au meynz, et ceo en lieu convenable*." The king's answer is, "As to that parliament shall be held every year, let the statutes thereupon be kept and preserved; but as to the place where the parliament shall be held, the king will therein do his pleasure." (*Rot. Parl.* No. 95.) And in the next year, the king declared he had summoned the parliament, because it was ordained that parliament should be held once a year. (*Rot. Parl.* 2 R. II. No. 4.)

But I can by no means agree with Mr. Sharp, and those who contend that it is the meaning of these records and statutes that there should be an election every year. The word parliament at that time did not necessarily include any such idea; for it is every where applied to a session without any distinction, whether it was held after a prorogation or a dissolution. (*Rot. Parl. passim.*) It is true that for some time after the house of commons was regularly established dissolutions were frequent; for at that time the electors were few, and a seat in parliament was considered rather a burden to be avoided than a distinction to be solicited; and the members were not enabled to recover their wages till the king had discharged them from further attendance, by putting an end to the parliament. In the first reigns after the representation of the commons was established, the duration and intermissions of parliaments were short; but for several reigns preceding the revolution, both had become extended to such a length, that it became necessary for the parliament to interpose its authority, and fix some limits to its own existence.

In the following reigns, the longest durations and intermissions were nearly as follows:

	Duration.	Intermission.
Hen. VIII.	6 years.	6 years.
Edw. VI.	4 - -	—
Eliz. -	11 - -	4
Ja. I. -	9 - -	6
Ch. I. -	8 - -	12
Ch. II. -	17 - -	4

See the printed Report of the Committee to examine Precedents in Impeachments, 19 April, 1791, (p. 16. *et. seq.*) In Ireland there was no regular meeting of the parliament from 1666 till 1692; and from the reign of Queen Anne in 1703, it assembled only once in two years, till 1783; since which time it has sat every year as in England. (*Lord Mountmor.* 419.)

Note 7, page 155, line 22, words of the former.—This part of the statute 6 W. & M. c. 2. confirms the statute 16 Car. II. c. 1. in declaring that there shall not be a longer interval than three years after a dissolution; but the 16 Car. II. seems to be more extensive in its operation, by providing that there shall not be an intermission of more than three years after any sitting of parliament, which will extend also to a prorogation. But as the mutiny act, and the land tax and malt tax acts are passed for one year only, these two statutes are now of little avail, for the parliament must necessarily be summoned for the dispatch of business once every year. In ancient times, especially before the abolition of the feudal tenures at the restoration of Ch. II. our kings had such a revenue, independent of parliament, that they were enabled to reign many years together without the assistance of parliament, and in defiance of the statutes mentioned in the preceding note.

Note 8, page 157, line 38, words *temporal nobility*.—In the place referred to, Lord Coke says, there were twenty-seven abbots and two priors, and he is there silent respecting the number of the temporal peers; but in the first page of the 4th Institute, he says their number, when he is then writing, is 106, and the number of the commons 493.

Note 9, page 158, (see note) words *throughout the whole*.—No rational or ancient principle can perhaps be suggested, why the bishops should not have exactly the same legislative functions as the other peers of parliament; the style of the house of lords, viz. the lords spiritual and temporal, was probably intended as a compliment to the bishops, to express the precedence that they are entitled to before all the temporal barons, which originally was the only character that gave a claim to a seat in the house of lords. Unless precedents could be found to the contrary, there seems to be no reason to doubt, but that any act at this day would be valid, though all the temporal lords or all the spiritual lords were absent.

In the 1 Eliz. c. 2. the style of the parliament is, the lords and commons in parliament assembled; but there is the same style used also in 1 Eliz. c. 11. a revenue act. Lord Mountmorres informs us, that on the 18th Feb. 1641, a motion was made in the Irish house of lords, "That as all the bishops were against a representation about certain grievances, the lords spiritual should not be named: upon which the judges were consulted; and their opinion was, that in any act or order which passed, it must be entered by the lords spiritual and temporal." 1 Vol. 344.

Note 10, page 160, line 34, words *the kingdom*.—The word commons in its present ordinary signification, comprizes all the people who are under the rank of peers, without any regard to property: but upon a future occasion, I shall endeavour to prove, that, in its original signification, it was confined to those only who had a right to sit, or had a right to vote for representatives in the house of commons.

Note 11, page 162, line 16, words *had thereto*.—This was a natural prologue to the tragical drama which was performed on the 30th of the same month.

Note 12, page 163, line 14, words *omnipotence of parliament*.—De Lolme has improved upon this, and has, I think, unwarrantably asserted, that "it is a fundamental principle with the English lawyers, that parliament can do every thing but make a woman a man, and a man a woman." (p. 134.) The omnipotence of parliament signifies nothing more than the supreme sovereign power of the state, or a power of action uncontrolled by any superior. In this sense, the king in the exercise of his prerogatives, and the house of lords in the interpretation of laws, are also omnipotent; that is, free from the control of any superior provided by the constitution.

Note 13, page 164, line 27, words *in that house*.—According to ancient principles, minors, unless actually knighted, must have

been disqualified ; for, in general, no one was capable of performing the feudal services till he had attained the age of twenty-one. And one of the most important of these services was, attendance on the lord's court. But if the king had conferred the honour of knighthood upon a minor, then it was held that the imbecility of minority ceased. See note to p. 68, 2d vol.

Note 14, page 164, line 30, words *steward or his deputy*.—On the first day of the meeting of every new parliament, the lord steward of his majesty's household attends in a room adjoining to the house of commons, and administers an oath to the members present ; and he then executes a commission or deputation, empowering any one or more of a great number of members specified in it, to administer the oath to others. *Com. Jour.*

Note 15, page 164, line 31, words 1 Geo. I. c. 13.—The oath of abjuration was altered by 6 Geo. III. c. 53. upon the death of the pretender.

Note 16, page 165, line 10, words *custom of parliament*.—This sentence was not in the first editions, but was added, no doubt, by the learned Judge, with an allusion to the Middlesex election. The circumstances of that case were briefly these : On the 19 Jan. 1764, Mr. Wilkes was expelled the house of commons, for being the author of a paper called the North Briton, No. 45. At the next election, in 1768, he was elected for the county of Middlesex ; and on 3 Feb. 1769, it was resolved that John Wilkes, Esq. having published several libels specified in the Journals, *be expelled this house* ; and a new writ having been ordered for the county of Middlesex, Mr. Wilkes was re-elected without opposition ; and on the 17 Feb. 1769, it was resolved, that " John Wilkes, Esq. having been in this session of parliament expelled this house, was and is incapable of being elected a member to serve in this present parliament ; " and the election was declared void, and a new writ ordered. He was a second time re-elected without opposition, and on 17 March, 1769, the house again declared the election void, and ordered a new writ. At the next election, Mr. Luttrell, who had vacated his seat by accepting the Chiltern Hundreds, offered himself a candidate against Mr. Wilkes. Mr. Wilkes had 1143 votes, and Mr. Luttrell 296. Mr. Wilkes was again returned by the sheriff. On the 15 April, 1769, the house resolved, that Mr. Luttrell ought to have been returned, and ordered the return to be amended. On the 29 April, a petition was presented by certain freeholders of Middlesex, against the return of Mr. Luttrell ; and on the 8 May, the house resolved that Mr. Luttrell was duly elected. On the 3 May 1783, it was resolved, that the resolution of the 17 Feb. 1769, should be expunged from the Journals of the house, as being subversive of the rights of the whole body of electors of this kingdom. And at the same time it was ordered, that all the declarations, orders, and resolutions respecting the election of John Wilkes, Esq. should be expunged. The history of England furnishes many instances of important constitutional questions that have deeply agitated the

minds of the people of this country, which can raise little or no doubt in the minds of those who view them at a distance uninfluenced by interest or passion. It might perhaps be a violent measure in the house of commons to expel a member for the libels which he had published; but that the subsequent proceedings were agreeable to the law of parliament, that is, to the law of the land, the authorities here referred to by the learned Judge, I conceive, do most unanswerably prove. But what shall be considered the law with regard to the incapacities of candidates, since these proceedings were expunged, it will be difficult indeed to determine. The resolution to expunge implies the correction of an error after mature deliberation. If it had not been declared, that a former resolution was subversive of the rights of electors, it might perhaps have been supposed, that it was intended only as a personal compliment to the member expelled. But unfortunately it does not inform us in what instance the former resolution was so subversive. Those who wish for a certain knowledge of their rights and liberties, must lament such want of precision; but they must wait with patience till the wisdom of the house has occasion to explain its own judgments.

Note 17, page 165, line 17, words *multis ignorata*.—Lord Holt has observed, that “as to what my lord Coke says, that the *lex parliamenti est a multis ignorata*, is only because they will not apply “themselves to understand it.” 2 *Ld. Ray.* 1114.

Note 18, page 165, (last words of the page) *stated laws*.—This sentence seems to imply a discretionary power in the two houses of parliament, which surely is repugnant to the spirit of our constitution. The law of parliament is part of the general law of the land, and must be discovered and construed like all other laws. The members of the respective houses of parliament are in most instances the judges of that law; and like the judges of the realm, when they are deciding upon past laws, they are under the most sacred obligation to inquire and decide what the law actually is, and not what, in their will and pleasure, or even in their reason and wisdom, it ought to be. When they are declaring what is the law of parliament, their character is totally different from that with which, as legislators, they are invested when they are framing new laws; and they ought never to forget the admonition of that great and patriotic chief justice lord Holt, viz. “that the authority of parliament is from the law, and as it is circumscribed by law, so it may “be exceeded; and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more “than the acts of private men.” 1 *Salk.* 505.

Note 19, page 166, line 26, words *privileges indefinite*.—In the observations above, upon the privileges of parliament, the Editor is obliged to differ from the learned Judge; he cannot but think that clearness and certainty are essentially necessary to the liberty of Englishmen. Mystery and ignorance are the natural parents of

superstition and slavery. How can rights and privileges be claimed and asserted, unless they are ascertained and defined? The privileges of parliament, like the prerogatives of the crown, are the rights and privileges of the people. They ought all to be limited by those boundaries which afford the greatest share of security to the subject and constituent, who may be equally injured by their extension as their diminution. The privileges of the two houses ought certainly to be such as will best preserve the dignity and independence of their debates and councils without endangering the general liberty. But if they are left uncertain and indefinite, may it not be replied with equal force, that under the pretence thereof the refractory members may harass the executive power, and violate the freedom of the people?

Note 20, page 166, line 28, words of *speech*.—The privileges of domestics, lands and goods, are taken away by 10 George III. c. 50. (See p. 167.)

Note 21, page 167, line 25, words *four score days at a time*.—It does not appear that the privilege from arrest is limited to any precise time after a dissolution; but it has been determined by all the judges that it extends to a convenient time. (*Col. Pitt's case*, 2 Str. 988.) Prynne is of opinion that it continued for the number of days the member received wages after a dissolution, which were in proportion to the distance between his home and the place where the parliament was held. 4 *Parl. Writs*, 68.

Note 22, page 168, line 36, words *to privilege*.—The contrary had been determined a short time before, in the case of Mr. Wilkes, by the unanimous judgment of lord Camden and the court of common pleas. 2 *Wilf.* 251.

Note 23, page 170, line 9, word *disuse*.—On account of this attendance, there are several resolutions before the restoration, declaring the attorney general incapable of sitting among the commons. Sir Heneage Finch, member for the university of Oxford, afterwards lord Nottingham and chancellor, was the first attorney general who enjoyed that privilege. *Sims*. 28.

Note 24, page 170, line 11, words *the king*.—This license has long ceased in Ireland; but the proxies in the English house of lords are still entered in Latin *ex licentiâ regis*: this created a doubt in Nov. 1788, whether the proxies in that parliament were legal on account of the king's illness? (1 *Ld. Mountm.* 342.) But this I conceive is now so much a mere form, that the license may be presumed. Proxies cannot be used in a committee. *Ib.* 106. A proxy cannot sign a protest in England, but he can in Ireland. (2 *Ib.* 191.)

The order that no lord should have more than two proxies was made 2 Car. I. because the duke of Buckingham had no less than fourteen. (1 *Rushw.* 269.)

A similar order was made in Ireland during lord Strafford's lieutenancy to correct a like abuse.

There is an instance in Wight, 50, where a proxy is called *litera attornatus ad parlamentum*, which it is in effect. The peer who has

the proxy is always called in Latin *procurator*. If a peer, after appointing a proxy, appears personally in parliament, his proxy is revoked and annulled. 4 *Inst.* 13. By the orders of the house, no proxy shall vote upon a question of guilty or not guilty; and a spiritual lord shall only be a proxy for a spiritual lord; and a temporal lord for a temporal. Two or more peers may be proxy to one absent peer; but lord Coke is of opinion (4 *Inst.* 12.) that they cannot vote unless they all concur. 1 *Woodd.* 41.

Note 25, page 170, line 19, word *protest*.—Lord Clarendon relates, that the first instances of protests with reasons in England were in 1641, before which time they usually only set down their names as dissentient to a vote; the first regular protest in Ireland, was in 1662. 1 *Ld. Mountm.* 402.

Note 26, page 171, (last line of the page) words *Sir M. Hale*.—This rule is now extended to all bills for canals, paving, provision for the poor, and to every bill in which tolls, rates, or duties are ordered to be collected; and also to all bills in which pecuniary penalties and fines are imposed for offences. (3 *Hatf.* 110.) But it should seem it is carried beyond its original spirit and intent, when the money raised is not granted to the crown.

Upon the application of this rule, there have been many warm contests between the lords and commons, in which the latter seem always to have prevailed. See many conferences collected by Mr. Hatsel, in his Appendix to the 3d vol.

In Appendix D, the conference of 20 & 22 April 1671, the general question is debated with infinite ability on both sides, but particularly on the part of the commons in an argument drawn up by Sir Heneage Finch, then attorney general.

Note 27, page 174, line 6, words *14th Geo. III.*—The 14 Geo. III. c. 38, made the residence of the electors and the elected in their respective counties, cities and boroughs no longer necessary. It had been required from both by a statute passed in the 1 Hen. V.

Note 28, page 174, line 12, word *taxes*.—The voter's evidence of the value must be received at the poll; but it is not conclusive, and may be contradicted by other evidence, upon a scrutiny, or before a committee. The 7 & 8 W. III. c. 25. expressly declares, that public taxes are not to be deemed charges payable out of the estate; and therefore one would think that the plain and obvious construction would be, that wherever a freeholder has an estate which would yield him 40s. before these taxes are paid, or for which he would receive a rent of 40s. if he paid the taxes himself, he would have a right to vote; yet a committee has decided that when a tenant paid a rent less than 40s. but paid parochial taxes, which added to the rent amounted to more than 40s. the landlord had no right to vote. A strange decision! 2 *Lud.* 475.

Two committees have held that the interest of a mortgage is a charge, which if it reduces the value under 40s. takes away the vote, though there is an intermediate decision of a committee, in which the contrary was held. *Id.* 467.

Note 29, page 175, line 12, words *so granted*.—And every person, who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40*l.* 10 *Ann. c. 23. s. 1.*

Note 30, page 175, line 16, words *months before*.—It must be an annuity or rent-charge issuing out of a freehold estate; and if it accrues or devolves by operation of law within a year of the election, a certificate of it must be entered with the clerk of the peace before the first day of the election. 3 *Geo. III. c. 24. Heyw. 145.*

Note 31, page 175, line 25, words *splitting freeholds*.—This is true only when a freehold estate is split and divided by the grantor in order to multiply votes and for election purposes. It would be highly unreasonable and absurd to suppose (though it has been so contended) that it extends to every case, where a person fairly and without any particular view to an election purchases a part of a greater estate. It is part of the freeholder's oath that the estate has not been granted to him fraudulently on purpose to qualify him to give his vote. The one vote I presume was intended for the part retained by the grantor, for if the whole had been granted out thus fraudulently, no vote at all could have been given for it. See this subject treated fully in Mr. Heywood's Law of Elect. 99. It cannot, I should think, be considered a fraudulent grant under any statute, if a person should purchase an estate merely for the sake of the vote, if he buys it absolutely, and without any reservation, or secret agreement between the grantor and himself.

But it never has been supposed that this statute extends to cases which arise from operation of law, as devises, descents, &c. as if an estate should descend to any number of females, the husband of each would have a right to vote, if his interest amounted to 40*l.* a year.

A husband may vote for his wife's right of dower without an actual assignment of it by metes and bounds. 20 *Geo. III. c. 17. s. 12.*

Two or more votes may be given successively for the same estate or interest at the same election; as where a freeholder votes and dies, his heir or devisee may afterwards vote at the same election. And it seems to be generally true, that where no length of possession is required by any act of parliament, the elector may be admitted to vote, though his right accrued since the commencement of the election. 1 *Doug. 272. 2 Lud. 427.*

Note 32, page 175, line 28, word *election*.—This is altered by 20 *Geo. III. c. 17.* The estate shall be assessed to the land-tax six months before the election, either in the name of the voter or his tenant; but if he has acquired it by marriage, descent, or other operation of law, in that case it must have been assessed to the land-tax within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, or in the name of the tenant of such person.

This requisite of assessment was intended to prevent fraud and confusion, by having a ready proof of the existence of the estate.

of the voter, and some measure of its value ; but it is itself perhaps a greater evil than it was intended to remove ; for an omission or irregularity in the assessment operates as a disfranchisement. Every freeholder, who wishes to preserve the important privilege of voting, must carefully examine every year the assessment, when it is stuck upon the church door, to see that he is duly assessed ; and if he is not, he may appeal to the commissioners, and he may any time afterwards apply to the clerk of the peace, and upon payment of 1s. may examine the duplicate returned to the sessions ; but it seems that he is then too late to correct an error, unless he has previously appealed to the commissioners ; but from the judgment of the commissioners an appeal lies to the next quarter sessions.

Note 33, page 176, line 2, word *counties*.—By 22 Geo. III. c. 41. no person employed in managing or collecting the duties of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, shall vote at any election, and if such person presumes to vote, he shall forfeit 100*l*. This act does not extend to freehold offices granted by letters patent.

Note 34, page 176, line 18, words *Edward III.*—Lord Coke, in the page referred to by the learned Judge, says, that this rate of wages hath been time out of mind, and that it is expressed in many records ; and for example, refers to one in the 46 Edw. III. where this allowance is made to one of the knights for the county of Middlesex. But Mr. Prynne's fourth Register of Parliamentary Writs, is confined almost entirely to the investigation of this subject, and contains a very particular chronological history of the writ *de expensis militum, civium, et burghensium*, which was framed to enforce the payment of these wages. Mr. Prynne is of opinion that these wages had no other origin than that principle of natural equity and justice *qui sentit commodum, debet sentire et onus*. (p. 5.)

I shall endeavour to prove, upon a future occasion, that representation at the first was nothing more than the attendance of a part of a number, who were individually bound to attend, and where the attendance of the rest was dispensed with ; and as all were under the same obligation to render this service, and it was left to themselves to determine which of them should undertake it, it became equitable that all should contribute to the expense and inconvenience incurred. And what Mr. Prynne informs us is remarkable : " that the first writs of this kind extant in our records " are coeval with our king's first writs of summons to elect and " send knights, citizens, and burgesses, to parliament, both of " them being first invented, issued, and recorded together in 49 " H. III. before which there are no memorials nor evidences of " either of those writs in our historians or records." (p. 2.) The first writs direct the sheriff to levy from the community, *i. e.* the electors of the county, and to pay the knights, *rationabiles expensas suas in veniendo ad dictum parlamentum, ibidem morando, et exinde ad*

propria redeundo. And when the writs of summons were renewed in the 23d of Ed. I. these writs issued again in the same form at the end of the parliament, and were continued in the same manner till the 16 Ed. II. when Mr. Prynne finds the "*memorable writs*," which first reduced the expenses of the representatives to a certain sum by the day, viz. 4s. a day for every knight, and 2s. for every citizen and burghers; and they specified also the number of days for which this allowance was to be made, being more or less according to the distance between the place of meeting in parliament and the member's residence. When this sum was first ascertained in the writ, the parliament was held at York, and therefore the members for Yorkshire were only allowed their wages for the number of days the parliament actually sat, being supposed to incur no expense in returning to their respective homes; but at the same time, the members for the distant counties had a proportionate allowance in addition. Though from this time, the number of days and a certain sum are specifically expressed in the writ, yet Mr. Prynne finds a few instances after this, where the allowance is a less sum; and in one, where one of the county members had but 3s. a day because he was not, in fact, a knight. But with those few exceptions, the sum and form continued with little or no variation. Mr. Prynne conjectures, with great appearance of reason, that the members at that time enjoyed the privilege of parliament only for the number of days for which they were allowed wages, that being considered a sufficient time for their return to their respective dwellings. (p. 68.) But this allowance, from its nature and origin, did not preclude any other specific engagement or contract between the member and his constituents; and the editor of Glanville's Reports has given in the preface, p. 23, the copy of a curious agreement between John Strange the member for Dunwich and his electors, in the 3 Ed. IV. 1463, in which the member covenants, "whether the parliament hold long time or short, or whether it fortune to be prorogued, that he will take for his wages only a cade and half a barrel of herrings, to be delivered by Christmas."

In Scotland the representation of the shires was introduced or confirmed by the authority of the legislature, in the seventh parliament of Ja. I. anno. 1427, and there it is at the same time expressly provided, that "the commissaires shall have costage of them of ilk schire, that awe compeirance in parliament." *Murray's Stat.*

It is said, that Andrew Marvell, who was member for Hull in the parliament after the restoration, was the last person in this country that received wages from his constituents. Two shillings a day, the allowance to a burghers, was so considerable a sum in ancient times, that there are many instances where boroughs petitioned to be excused from sending members to parliament, representing that they were engaged in building bridges or other public works, and therefore unable to bear such an extraordinary expense. (*Pryn. on 4 Inst.* 32.) And it is somewhat remarkable, that from

the 33 Ed. III. and uniformly through the five succeeding reigns, the sheriff of Lancashire returned, *non sunt aliquæ civitates seu burgi infra comitatum Lancastrie, de quibus aliqui cives vel burgenfes ad dictum parliamentum venire debent seu solent, nec possunt propter eorum debilitatem & paupertatem.* But from these exemptions in ancient times, and the new creations by the king's charter, which commenced in the reign of Ed. IV. (who in the 17th year of his reign) granted to the borough of Wenlock the right of sending one burgess to parliament, (*Sim. 97.*) the number of the members of the house of commons perpetually varied till the 29 Car. II. who in that year granted, by his charter, to Newark, the privilege of sending representatives to parliament, which was the last time that this prerogative of the crown was exercised. (*1 Doug. El. 69.*) Since the beginning of the reign of Hen. VIII. the number of the representatives of the commons is nearly doubled; for in his first parliament the house consisted only of 298 members: it does not appear that any place has lost its right of sending representatives since that time; and 260 have since been added by act of parliament, or by the king's charter either creating new or reviving old boroughs. The legislature added 27 for Wales by 27 Hen. VIII. c. 26; 4 for the county and city of Chester by 34 Hen. VIII. c. 13; 4 for the county and city of Durham by 25 Car. II. c. 9; and 45 for Scotland by the act of union: in all 80; and 180 have been added by charter: Hen. VIII. created or restored by charter 4. See *Pref. to Glauv. Rep.*

Ed. VI.	48
Mary	21
Elizabeth	60
Ja. I.	27
Ch. I.	18
Ch. II.	2
	180
Parliament has created	80
In the first parliament of Hen. VIII.	298

In all 558 the present number.

To the first parliament of Ja. I. the members of the upper-house were 78, of the lower, 470. 5 *Parl. Hist.* II.

Note 35, page 177, line 7, words *concerning it.*—That statute was merely retrospective, or only made the last determination of the right prior to the statute conclusive, without having any influence over decisions subsequent to the 2 Geo. II. And this provision was omitted in Mr. Grenville's excellent act, so that the same question, respecting the right of election in some places, was tried over again every new parliament; but to supply this defect, it was enacted by the 28 Geo. III. c. 52. that whenever a committee shall be of opinion that the merits of a petition depend upon a question respecting the right of election, or the appointment of the returning officer, they

shall require the council of the respective parties, to deliver a statement of the right for which they contend, and the committee shall then report to the house those statements with their judgments thereupon; and if no person petition within a twelvemonth, or within fourteen days after the commencement of the next session, to oppose such judgment, it is final and conclusive forever. But if such a petition be presented, then, before the day appointed for the consideration of it, any person, upon his petition, may be admitted to defend the judgment; and a second committee shall be appointed exactly in the same manner as the first, and the decision of that committee puts an end to all future litigation upon the point in question.

Note 36, page 177, line 11, words *months before*.—This is called the Durham act, and it was occasioned by the corporation of Durham having, upon the eve of an election, in order to serve one of the candidates, admitted 215 honorary freemen. Some corporations have the power of admitting honorary freemen, viz. persons who, without any previous claim or pretension, are admitted to all the franchises of the corporation. The Durham act is confined to persons of that description solely. It has frequently been contended, that if honorary freemen are created for the *occasion*, that is, merely for an election purpose, it is a fraud upon the rights of election; and that by the common law, as in other cases of fraud, the admission and all the consequences would be null and void; that within the year, by the statute, fraud was presumed; but that after that time, the statute left the necessity of proving it upon those who imputed it. But in the Bedford case (2 Doug. 91.) the committee were clearly of opinion, that the objection of occasionality did not lie against freemen made above a year before the election.

No length of possession is required from voters in burgage-tenure boroughs. There are about twenty-nine burgage-tenure boroughs in England. (1 Doug. 224.) In these the right of voting is annexed to some tenement, house, or spot of ground, upon which a house in ancient times has stood. Any number of these burgage-tenure estates may be purchased by one person, which, at any time before a contested election, may be conveyed to so many of his friends, who would each in consequence have a right to vote.

By the 26 Geo. III. c. 100. it is enacted, that in boroughs, where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he has actually been resident in the borough six months previous to the day on which he tenders his vote.

Note 37, page 177, line 20, word *convocation*.—It was decided by a committee of the house of commons in the case of Newport in 1785, that a gentleman who had been regularly admitted to deacon's orders, was capable of being a member of that house. (See 2 Lud. 269.) Many of the arguments in that case may be urged with equal force for the admission and exclusion of a person in

priest's orders. The chief authorities for the exclusion of the clergy are the entries in the commons' journals, referred to by the learned Judge in the notes; in the two first of which this reason is assigned, viz. that the persons returned being clerks, they have or might have a voice in the house of convocation. And lord Coke also says, (4 *Inft.* 47.) that "none of the clergy, though they be of the lowest order, are eligible, because they are of another body, viz. of the convocation;" and he refers to the first entry in the commons' journals. Besides these authorities, there are canons of the church which prohibit the clergy from *voluntarily relinquishing the office of a deacon or minister*, and from using themselves in the course of their lives as laymen, and from *exercising secular jurisdictions*, (1 *Gibf. Cod.* 180. 184.) Mr. Wooddson has observed, that the argument from the convocation ought not to be urged against the unbeneficed clergy, as none but the beneficed clergy voted for the proctors or representatives in convocation. (1 *Woodd.* 47.)

This reason for disqualifying the inferior clergy from sitting in the house of commons, would extend to the exclusion of the bishops from the house of lords. It happens not unfrequently that a peerage descends to a clergyman in priest's orders, and it has never been supposed that this sacred character, although he should retain a benefice, would disable him from taking his seat in the upper house. And this argument is stronger when we consider that, in the origin of our parliaments, the qualifications of the members of the two houses were precisely the same, viz. land held *in capite* of the king. Until the reformation, 29 of the regular clergy, abbots and priors, who were dead in law to most other purposes, had seats in the house of lords, in consequence of the lands which they held of the crown. In Scotland the barons and commissioners of shires sat together and constituted one estate. It would have been unaccountable if holy orders by the common law had excluded one part of that estate from parliament, and not the other; but both in Scotland and Ireland the clergy were declared ineligible by statute; which affords an inference that, without the authority of an act of parliament, they would of common right have participated this privilege with other subjects, (*Wight*, 293. 1 *Ld. Mountm.* 50.) The argument drawn from the sitting in the convocation has been called a *new pretence* in the time of queen Mary, in order to expel some protestant clergy from the house, (*Hody, Conv.* 429.) There is a memorable instance in the time of Richard II. of a clergyman who signalized himself in the house of commons; he is called sir Thomas Haxey, clerk; he brought in a bill, which passed the commons, to lessen the expenses of the king, and to remove bishops and ladies from the court; for which the commons were obliged to make concessions, and to surrender the author of the bill to the king; and he was afterwards condemned by the parliament to die as a traitor, but his life was spared at the intercession of the bishops because he was a clergyman, (*Rot. Parl.* 20. R. 2. n^o. 16 & 23.) The boldness of his conduct proves that he had no suspicion that

his title to a seat in parliament could be questioned. With regard to the canons, they seem to have as little weight as the argument drawn from the convocation; for they prove nothing by proving too much: for these canons, if available, would also preclude the clergy from acting in the commission of the peace, a secular jurisdiction which they have long exercised. If the clergy were eligible prior to, or independent of the canons, then the validity of them may be justly questioned, even of those made antecedent to 25 Hen. VIII. (see ante, p. 83.) for persons, who were eligible might in all cases, and may still in some, be compelled to serve in parliament against their consent (1 Doug. El. Cases, 284); and no set of men ought to be allowed to disable themselves and deprive their country of their services by any laws of their own, which are not expressly confirmed by the authority of the legislature. The objection to a clergyman's eligibility does not seem to be much stronger even when he is beneficed; for, from the residence enforced by the spiritual judge, the 9th ch. of the *articuli cleri* 9 Ed. 2. exempts and privileges those who are engaged in the service of the king and commonwealth; *nec debet dici tendere in prejudicium ecclesiastica libertatis quod pro rege et republica necessarium invenitur*; which lord Coke declares is worthy to be written in letters of gold, (2 Inst. 625.) An attendance in parliament is pre-eminently *pro rege et republica necessarium*. With regard to the residence required by the 21 Hen. VIII. c. 13. I conceive that important rights and franchises are not lost or destroyed merely because they become in some degree inconsistent with the provisions of a new statute, which is entirely silent respecting them; if that were the case, the beneficed clergy have also lost their capacity to sit in the convocation; for though the statute makes exception in some cases of absence, as upon pilgrimages and the king's service abroad, yet there is no exception for attendance upon the convocation; but even when the clergy were permitted to tax themselves in convocation, that circumstance was very inadequate to debar them from electing or being elected to parliament. Taxation is certainly an important branch of legislation; yet it is far from the whole concern of that power which superintends and protects our lives, liberty, and property. When the clergy ceased to tax themselves, the reason for their sharing in the rights and privileges of representation was strengthened but not created. After the clergy granted the last subsidy in convocation in 1663, and were afterwards taxed in parliament, as if this alone had precluded them from a share of parliamentary representation, they tendered their votes in right of their glebes at county elections, which have ever since been received with tacit approbation. But the capacity to elect and to be elected being originally the same, when you take away an obstruction from the one, you remove it also from the other, unless some express law has superinduced a farther impediment: but I apprehend that the reason that the clergy, having no other lands than their glebes, never voted nor were elected in ancient times, did not in any degree depend either upon taxation or the convocation; but that it was

owing solely to the tenure of their glebe land, viz. frankalmoign, which exempted them from attendance on the courts of the king, lords, and sheriffs (2 *Bl.* 101.); and even if they held other lands, holy orders exempted them by the common law from secular services and temporal offices; and this was confirmed by magna charta and the statute of Marlbridge. (2 *Inst.* 3 & 121.) This was an exemption, and not an exclusion; but what are now important rights, were originally considered duties and burdens; it is not therefore strange, that the clergy should avail themselves of this privilege till the disuser became regarded as an incapacity. Their glebe lands are, no doubt, freeholds under the 8 Hen. VI. c. 7; and when they were admitted to vote for representatives in right of these freeholds, it followed as a consequence, that they were also eligible to represent, unless some better authority can be produced for their exclusion than merely disuse, or their having a voice in the convocation, where they no longer tax themselves, or their being prohibited by canons, which in other instances are disregarded, and which probably could never be thought to be obligatory upon the parliament.

Note 38, page 178, line 2, words of another.—Two decisions of committees are agreeable to what is advanced in the text. In the first it was determined, that the sheriff of Berkshire could not be elected for Abingdon, a borough within that county (1 *Doug.* 419.): in the second, that the sheriff of Hampshire could be elected for the town of Southampton within that county, because Southampton is a county of itself, and is as independent of Hampshire as of any other county. 4 *Doug.* 87.

Note 39, page 178, line 21, words *elected, or sitting*.—All the persons enumerated above are utterly incapable of sitting in the house of commons, whilst they continue in their respective situations; and amongst these are all persons who accept from the crown any office created since 1705. But by the 26th section of the same act, 6 Ann. c. 7. if any member shall accept of any office of profit from the crown, his election or seat becomes void, but he may be re-elected. This means an office of profit, which was in existence prior to 1705.

The office or trust of a member of parliament cannot be resigned, and every member is compellable to discharge the duties of it, unless he can shew such cause, as the house in its discretion will think a sufficient excuse for his non-attendance upon a call of the house. The only way therefore of vacating a seat, is by accepting a situation, in consequence of which the law declares his seat vacant. So where members wish to vacate their seats and retire from parliament, it is now usual for the crown to grant them the office of the stewardship of the Chiltern Hundreds. Mr. Hatfield observes, that "the practice of accepting this nominal office, which began, he believes, only about the year 1750, has been now so long acquiesced in from its convenience to all parties, that it would be ridiculous to state any doubt about the legality

"of its proceedings; otherwise, (he believes,) it would be found very difficult, from the form of these appointments, to shew that it is an office of profit under the crown." (2 *Hatf.* 41.) But Mr. Hatfell himself raises a doubt, which I do not think he removes; for surely no usage since 1750, or no usage whatever, can countervail the clear and express words of an act of parliament.

Note 40, page 178, line 28, word *knights*.—This, by the statute *de militibus* 1 Ed. II. was twenty pounds a year, and put in force against those who had 40*l.* a year till 16 Car. I. c. 16. See p. 404.

Note 41, page 178, line 33, word *copyhold*.—Or mortgage, if the mortgagee has been seven years in possession.

Note 42, page 179, line 9, words *his feat*.—By 22 Geo. III. c. 45. no contractor with the officers of government, or with any other person for the service of the public, shall be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners, or to any person to whom the interest of such a contract shall accrue by marriage or operation of law for the first twelve months. And if any person, disqualified by such a contract shall sit in the house, he shall forfeit 500*l.* for every day; and if any person who engages in a contract with government, admits any member of parliament to a share of it, he shall forfeit 500*l.* to the prosecutor.

Note 43, page 179, line 16, word *legislature*.—This clause from the word (*though*) has been added since 1769, the time when the Middlesex election was discussed in the house of commons. The learned Judge upon that occasion maintained the incapacity of Mr. Wilkes to be re-elected that parliament, in consequence of his expulsion; and as he had not mentioned expulsion as one of the disqualifications of a candidate, the preceding sentence was cited against him in the house of commons, and he was afterwards attacked upon the same ground by Junius (let. 18.) and, as I conceive, undeservedly; for hard would be the fate of authors, if, whilst they are labouring to remove the errors of others, they should forever be condemned to retain their own. See note (16,) p. 163.

Note 44, page 180, line 7, word *peer*.—With regard to a vacancy by death or a peerage during a recess, the 24 Geo. II. c. 2. c. 26. which repeals the former statutes upon this subject, provides, that if during any recess any two members give notice to the speaker by a certificate under their hands, that there is a vacancy by death, or that a writ of summons has issued under the great seal to call up any member to the house of lords, the speaker shall forthwith give notice of it to be inserted in the Gazette; and at the end of fourteen days after such insertion, he shall issue his warrant to the clerk of the crown, commanding him to make out a new writ for the election of another member. But this shall not extend to any

case where there is a petition depending concerning such vacant seat, or where the writ for the election of the member so vacating had not been returned fifteen days before the end of the last sitting of the house, or where the new writ cannot issue before the next meeting of the house for the dispatch of business. And to prevent any impediment in the execution of this act, by the speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every parliament he shall appoint any number of members from three to seven inclusive, and shall publish the appointment in the Gazette. These members, in the absence of the speaker, shall have the same authority as is given to him by this statute. These are the only cases provided for by act of parliament; so for any other species of vacancy no writ can issue during a recess.

Note 45, page 180, line 12, words *three days*.—The officer of the cinque ports has six days by 10 & 11 W. III. c. 7.

Note 46, page 181, line 18, word *election*.—This is altered by 25 Geo. III. c. 84. which enacts, that in every county, the sheriff having indorsed on the back of the writ the day on which he receives it, shall, within two days after the receipt thereof, cause proclamation to be made at the place where the ensuing election ought by law to be held, of a special county court to be there held, for the purpose of such election only, on any day, Sunday excepted, not later from the day of making such proclamation than the 15th day, nor sooner than the 10th; and that he shall proceed in such election at such special county court, in the same manner as if the said election had been held at a county court, or at an adjourned county court, according to the former laws.

Note 47, page 182, line 1, word *prohibited*.—In support of this principle the 3 Ed. I. c. 3. is generally cited: *Et pur ceo que elections doivent estre franches, le roi defende sur sa greve forfaiture, que nul baunt homme n'autre per poiar des armes, ne per menaces, ne dislourbe de faire franche election*. The principle is good, and ought to be applied to all elections; but the elections which the legislature had then in contemplation, were those of the sheriff, coroner, &c. for the house of commons, and of course elections of its members had not then existence. And as it would be repugnant to this principle and to sound policy, it is decided, that a wager between two electors upon the success of their respective candidates is illegal and void. For, if it were permitted, it would manifestly corrupt the freedom of elections. 1 T. R. 55.

Note 48, page 182, line 35, words *of the writs*.—Or after the ordering of the writs; that is, after the signing of the warrant to the chancellor for issuing the writs. *Sim.* 165.

Note 49, page 182, (last line) word *parliament*.—That is, incapable of serving upon that election; this is provided by 7 W. III. c. 4. commonly called the treating act; and it has been decided by a committee, according to the plain and obvious meaning of the words of the statute, that treating vacates that election only; and that the

candidate is no way disqualified from being re-elected and sitting upon a second return. (See the 2d case of Norwich 1787, 3 *Lud.* 455, though the contrary was determined in the case of Honiton 1782, *ib.* 162.) It has been supposed, that the payment of travelling expenses, and a compensation for loss of time, were not treating or bribery within this or any other statute; and a bill passed the house of commons to subject such cases to the penalties imposed by 2 Geo. II. c. 24. upon persons guilty of bribery. But this bill was rejected in the house of lords by the opposition of lord Mansfield, who strenuously maintained that the bill was superfluous; that such conduct by the laws in being, was clearly illegal, and subject, in a court of law, to the penalties of bribery. (2 *Lud.* 67.) Indeed it is so repugnant both to the letter and spirit of these statutes, that it is surprising that such a notion and practice should ever have prevailed. It is certainly to be regretted, that any elector should be prevented by his poverty from exercising a valuable privilege; but the nation would have much greater cause to lament, if it were deprived of the services of all gentlemen of moderate fortune, by the legalizing of such a practice, even with the most equitable restrictions, not to mention the door that it would open to the grossest impurity and corruption.

Note 50, page 183, line 8, word *offence*.—This is enacted by 2 Geo. II. c. 24. explained and enlarged by 9 Geo. II. c. 38. and 16 Geo. II. c. 11. but these statutes do not create any incapacity of sitting in the house, that depends solely upon the treating act mentioned in the preceding note.

It has been held that it is bribery if a candidate gives an elector money to vote for him, though he afterwards votes for another (3 *Burr.* 1235.); and there can be no doubt, but it would also be bribery in the voter, for the words of the statute clearly make the offence mutual. And it has been decided that such vote will not be available to the person to whom it may afterwards be given gratuitously: for the elector swears he has received no money, gift, or reward, in order to give his vote; and an election ought not to depend upon a vote so contaminated with perjury, bribery, and treachery; and the voter's previous conduct must raise a strong suspicion that he gives his vote rather from the inducement of a higher bribe, than from the conviction of his conscience. But the propriety of this decision has been questioned by respectable authority. (2 *Doug.* 416) An instance is given in 4 *Doug.* 366. of an action, in which twenty-two penalties, 11,000*l.* were recovered against one defendant. But besides the penalties imposed by the legislature, bribery is a crime at common law, and punishable by indictment or information, though the court of king's bench will not in ordinary cases grant an information within two years, the time within which an action may be brought for the penalties under the statute. (3 *Burr.* 1335. 1359.) But this rule does not affect a prosecution by an indictment or an information by the attorney-general, who in one case was ordered by the house to prosecute two gentlemen who had procured themselves to be returned

by bribery; they were convicted and sentenced by the court of king's bench to pay each a fine of 1000 marks, and to be imprisoned six months. 4 *Doug.* 292.

Note 51, page 183, line 16, word *assessed*.—Lord Mansfield observed upon this, that there could be no fine set in the house of commons; it must have been in the star chamber (3 *Burr.* 1336;) but the journals of the commons on the day referred to by the learned Judge expressly state, that it is ordered by this house that a fine of 20 pounds be assessed upon the corporation for their said lewd and slanderous attempt.

Note 52, page 183, line 27, words *if required*.—If any candidate, upon a reasonable request from another candidate, or by two of the electors either at the election, or at any time before the return of the writ, shall refuse to swear to his qualification, his election shall be void. (9 *Ann.* c. 5.)

Note 53, page 183, (last line) word *electors*.—All electors are compellable before they vote to take the oaths of allegiance and supremacy, 7 and 8 W. III. c. 27. And by the 25 Geo. III. c. 84. all electors for cities and boroughs shall swear to their name, addition or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of 21, and that they have not been polled before at that election. And by the same statute it is enacted, that if a poll is demanded at any election for any county or place in England or Wales, it shall commence either that day, or at the farthest upon the next, and shall be continued from day to day (Sundays excepted) until it be finished; and it shall be kept open seven hours at the least each day, between eight in the morning and eight at night; but if it should be continued till the 15th day, then the returning officer shall close the poll at or before three in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of votes; and he shall forthwith make a return accordingly, unless a scrutiny is demanded by any candidate, or by two or more of the electors, and he shall deem it necessary to grant the same, in which case it shall be lawful for him to proceed thereupon; but so as that, in all cases of a general election, if he has the return of the writ, he shall cause a return of the members to be filed in the crown office on or before the day on which the writ is returnable. If he is a returning officer acting under a precept, he shall make a return of the members at least six days before the day of the return of the writ; but if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within 30 days after the close of the poll. Upon a scrutiny, the returning officer cannot compel any witness to be sworn, though the statute gives him power to administer an oath to those who *consent* to take it.

Note 54, page 184, line 20, words 10 *Geo. III.*.—This statute is better known by the name of Grenville's act, and it has justly conferred immortal honour upon its author. The select committees appointed pursuant to this statute, have examined and decided the

important rights of election with a degree of purity and judicial discrimination highly honourable to themselves ; and which were still more satisfactory to the public from the recollection of the very different manner in which these questions, prior to 1770, had been treated by the house at large.

But this act has been much improved by 25 Geo. III. c. 84. & 28 Geo. III. c. 52. By these statutes any person may present a petition complaining of an undue election ; but one subscriber of the petition must enter into a recognizance, himself in 100*l.* with two sureties in 100*l.* each, to appear and support his petition ; and then the house shall appoint some day beyond the days after the commencement of the session, or the return of the writ, and shall give notice to the petitioners and the sitting members to attend the bar of the house on that day by themselves, their council, or agents ; this day, however, may be altered, but notice shall be given of the new day appointed. On the day fixed, if 100 members do not attend, the house shall adjourn from day to day, except over Sundays, and for any number of days over Christmas day, Whitsunday, and Good Friday ; and when two or more members are present, the house shall proceed to no other business except swearing in members, receiving reports from committees, amending a return, or attending his majesty or commissioners in the house of lords. Then the names of all the members belonging to the house are put into six boxes or glasses in equal numbers, and the clerk shall draw a name from each of the glasses in rotation, which name shall be read by the speaker, and if the person is present and not disqualified, it is put down ; and in this manner they proceed, till forty-nine such names are collected. But besides these forty-nine, each party shall select, out of the whole number present, one person, who shall be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned against, cannot serve ; and persons who are sixty years of age, or who have served before, are excused if they require it ; and others who can shew any material reason, may also be excused by the indulgence of the house. After 49 names are so drawn, lists of them shall be given to the respective parties, who shall withdraw, and shall alternately strike off one (the petitioners beginning) till they are reduced to 13 ; and these 13, with the two nominees, constitute the select committee. If there are three parties, they shall alternately strike off one ; and in that case the 13 shall choose the two nominees.

The members of the committee shall then be ordered by the house to meet within 24 hours, and they cannot adjourn for more than 24 hours, except over Sunday, Christmas day, and Good Friday, without leave of the house ; and no member of the committee shall absent himself without the permission of the house. The committee shall not in any case proceed to business with fewer than 13 members ; and they are dissolved if for three successive days of sitting their number is less than that, unless they have sat 14 days, and then they may proceed, though reduced to 12 ; and if 25 days,

to 11 : and they continue to sit notwithstanding a prorogation of the parliament. All the fifteen members of the committee take a solemn oath in the House, that they will give a true judgment according to the evidence, and every question is determined by a majority.

The committee may send for witnesses and examine them upon oath, a power which the house of commons does not possess ; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs. For their mode of reporting the right of election, see note (35.) p. 177.

These are the principal provisions of this excellent statute, under its present improved state.

Note 55, page 185, line 1, words *may elect*.—Such an instance in the Irish house of lords is mentioned by lord Mountmorres, 2 Vol. 108.

Note 56, page 185, line 2, words *by the house*.—Mr. Hume is mistaken, who says that Peter de la Mere, chosen in the first parliament of R. II. was the first speaker of the commons (3 Vol. 3.) ; for we find in the rolls of parliament, (51 Ed. III. n^o 87.) that sir Thomas Hungerford *chevalier qui avoit les parolles des communes en cest parlement*, addressed the king in the name of the commons, in that jubilee year, to pray that he would pardon several persons who had been convicted in impeachments. And there he is not mentioned, as if his office was a novelty.

Note 57, page 185, line 3, words *by the king*.—Sir Edward Coke, upon being elected speaker in 1592, in his address to the throne declared, “ this is only as yet a nomination, and no election, until “ your majesty giveth allowance and approbation.” (2 *Hist.* 154.) But the house of commons at present would scarce admit their speaker to hold such language. Till sir Fletcher Norton was elected speaker, 29th Nov. 1774, every gentleman who was proposed to fill that honourable office, affected great modesty, and if elected, was almost forced into the chair, and at the same time he requested permission to plead, in another place, his excuses and inability to discharge the office, which he used to do upon being presented to the king. But sir Fletcher Norton was the first who disregarded this ceremony both in the one house and in the other. His successors Mr. Cornwall and Mr. Addington, requested to make excuses to the throne, but were refused by the house, though Mr. Addington, in the beginning of the present parliament, 26th Nov. 1790, followed the example of Sir Fletcher Norton, and intimated no wish to be excused. (See 1 *Woodd.* 59.) Sir John Cust was the last speaker who addressed the throne in the language of diffidence, of which the following sentence may serve as a specimen : “ I can now be an humble suitor to your majesty, that you would “ give your faithful commons an opportunity of rectifying this the “ only inadvertent step which they can ever take, and be graciously “ pleased to direct them to present some other to your majesty,

"whom they may not hereafter be sorry to have chosen, nor your majesty to have approved." (6 Nov. 1761.) The chancellor used to reply in a handsome speech of compliment and encouragement, but now he shortly informs the commons that his majesty approves of their speaker, who claims the ancient privileges of the commons, and then they return to their own house.

Some speakers upon this occasion have acquired great honour and distinction, particularly Thomas Nevile, *germanes frater domini Burgonny, qui electus prolocutor per communes sacre regie majestati est presentatus, et ita egregie, eleganter, prudenter, et disertè in negotio sibi commissio se gessit, ut omnium presentium plausu et letitiâ, maximam sibi laudem comparavit, ejus laudi sacra regia majestas non modicum eximium honoris cumulum adiecit, nam presentibus et videntibus dominis spiritualibus et temporalibus et regni communibus eum equitis aurati honore et dignitate ad laudem Dei et sancti Georgii insignivit, quod nemini mortalium per ulla antea secula contigisse audivimus.* 6 Hen. VIII. 1 Lords' Journ. 20.

Note 58, page 185, line 8, words *binds the wobble*.—In the house of commons the speaker never votes but when there is an equality without his casting vote, which in that case creates a majority; but the speaker of the house of lords has no casting vote, but his vote is counted with the rest of the house; and in the case of an equality, the non-contents or negative voices have the same effect and operation as if they were in fact a majority. (Lords' Journ. 25 June, 1661.) Lord Mountmorres says, that the house of lords in Ireland observes the same rule; and that in cases of equality, *semper presumitur pro negante.* (1 vol. 105.) Hence the order in putting the question in appeals and writs of error is this: "Is it your lordship's pleasure that this decree or judgment shall be reversed?" for if the votes are equal, the judgment of the court below is affirmed. (*Ib.* 2 Vol. 81.) Here it may not be improper to observe that there is no casting voice in courts of justice; but in the superior courts if the judges are equally divided, there is no decision, and the cause is continued in court till a majority concur. At the sessions the justices, in case of equality, ought to respite the matter till the next sessions; but if they are equal one day, and the matter is duly brought before them on another day in the same sessions, and if there is then an inequality, it will amount to a judgment; for all the time of the sessions is considered but as one day. A casting vote sometimes signifies the single vote of a person, who never votes but in the case of an equality; sometimes the double vote of a person, who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote.

A casting vote neither exists in corporations or elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage.

Note 59, page 185, line 28, words *of petitions*.—The commons for near two centuries continued the style of very humble petitioners. Their petitions frequently began with "your poor commons beg" and pray," and concluded with "for God's sake, and as an act of

"charity":—*Vos poveres communes prient et supplient, par Dieu et en œuvre de charité.* (Rot. Parl. passim.) It appears that prior to the reign of Hen. V. it had been the practice of the kings to add and enact more than the commons petitioned for. In consequence of this there is a very memorable petition from the commons in 2 Hen. V. which states that it is the liberty and freedom of the commons that there should be no statute without their assent, considering that they have ever been as well *assenters* as *petitioners*, and therefore they pray that for the future there may be no additions or diminutions to their petitions. And in answer to this the king granted that from henceforth they should be bound in no instance without their assent, saving his royal prerogative to grant and deny what he pleased of their petitions. (*Ruff. Pref. xv. Rot. Parl. 2 Hen. V. n° 22.*) It was long after its creation, or rather separation from the barons, before the house of commons was conscious of its own strength and dignity; and such was their modesty and diffidence, that they used to request the lords to send them some of their members to instruct them in their duty, "on account of the arduousness of their charge, and the feebleness of their own powers and under-standings":—*pur l' arduité de leur charge, et le feiblesce de leur poiair et sens.* (Rot. Parl. 1 R. II. n° 4.)

Note 60, page 188, line 20, words *Norman-French*.—Until the reign of Richard III. all the statutes are either in French or Latin, but generally in French. I have never seen any reason assigned for this change in the language of the statutes. Richard being an usurper, probably thought that it would produce him a degree of popularity to give the people statutes in their own language, which had hitherto been as illegible as the laws of Caligula. But the general answers of the king to the bills were so well understood, that a change in them was of no importance to the people, and only desirable for the sake of consistency.

Note 61, page 188, line 20, word *s'avisera*.—The words *le roi s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment, viz. *curia advisare vult*. And there can be little doubt but originally these words implied a serious intent to take the subject under consideration, and they only became in effect a negative, when the bill or petition was annulled by a dissolution, before the king communicated the result of his deliberation: for in the rolls of parliament the king sometimes answers, that the petition is unreasonable, and cannot be granted; sometimes he answers, that he and his council will consider of it; as in 37 Ed. III. n° 33. *Quant au ceste article, il demande grand avissement, et partant le roi se eult avisera par son conseil.*

This prerogative of rejecting bills was exercised to such an extent in ancient times, that D'ewes informs us, that queen Elizabeth, at the close of one session, gave her assent to 24 public, and 19 private bills; and at the same time rejected 48, which had passed the two houses of parliament. (*Journ. 596.*) But the last time it

was exerted was in the year 1692 by Wm. III. who at first refused his assent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards. *De Lolme*, 404.

Note 62, page 190, line 30, word *proclamation*.—At the beginning of a new parliament, when it is not intended that the parliament should meet at the return of the writ of summons for the dispatch of business, the practice is, to prorogue it by a writ of prorogation, as the parliament in 1790 was prorogued twice by writ; *Comm. Journ.* 26th Nov. 1790; and the first parliament in this reign was prorogued by four writs. *Ib.* 3. Nov. 1761. On the day upon which the writ of summons is returnable, the members of the house of commons who attend, do not enter their own house, or wait for a message from the lords, but go immediately up to the house of lords, where the chancellor reads the writ of prorogation, *Ib.* And when it is intended that they should meet upon the day to which the parliament is prorogued for dispatch of business, notice is given by a proclamation.

Note 63, page 191, line 1, words *session at all*.—Mr. Hatfield mentions one great inconvenience which, he apprehends, might arise from this rule:—The 6 Ann. c. 7. s. 6. provides, that upon the death of the king, if there is no parliament in being *that has met and sat*, then the last preceding parliament shall immediately convene and sit, as if the said parliament had never been dissolved. He says, the construction of the words *has met and sat*, has always been understood to be a parliament of which a session has been held. (*2 Hatf.* 219.)—This is a construction to which I cannot accede. The word *session* has a legal and technical signification; we know its property and consequences, but there is no reason that we should annex them all to the popular word *sit*. The object of the statute was probably this, viz. if the king should die after the issuing the writs for a new parliament during a general election, that the kingdom should not continue in a state of ferment and confusion, but that the old parliament should immediately revive and convene. It never could be the intension of the legislature, that, after the members of a new parliament had qualified themselves, and had been sitting perhaps for many weeks, this parliament, upon the death of the king, should be sent home, and the members of the old parliament should be collected, merely because the new parliament had not passed a bill. I conceive it would be sufficient, to satisfy the provision of this statute, that such a number of members had met, and had taken the oaths, as to actually constitute a house in each house of parliament. To sit in this case must be equivalent to take their seats, which is its signification in the same sentence, viz. *to convene and sit*, otherwise the new king would be compelled to make a session, by assenting to a bill before he prorogued or dissolved them.

Note 64, page 191, line 24, word *re-assembling*.—This was provided by a clause in several militia acts, but that provision is mate-

rially altered by the 26th Geo. III. c. 107. It has been held that after a prorogation, except under the circumstances and in the manner described in that statute, the king cannot summon a parliament before the day to which it was last prorogued. And it is understood, that when a parliament is prorogued to a certain day, they do not meet on that day, unless it be particularly declared by the proclamation that gives notice of the prorogation, that they shall meet for the dispatch of business; and when it has not been prorogued by such a proclamation, and it is intended that parliament shall actually sit, it is the established practice to issue a proclamation to give notice that it is for the dispatch of business; and this proclamation, unless upon some urgent occasion, bears date at least forty days before the meeting. (2 *Half* 239) But by 26 Geo. III. c. 107. s. 95. in all cases of actual invasion or imminent danger of it, and in cases of rebellion or insurrection, the king, having first communicated the occasion to parliament, if sitting, and if no parliament be sitting, having notified the occasion by proclamation, may order the militia to be called out and embodied. And whenever this is done, if the parliament be adjourned or prorogued, he shall convene them within fourteen days.

Pursuant to this statute the parliament met on the 13th Dec. 1792, the only doubt being at that time, whether the measure was justified by an actual insurrection?

Note 65, page 193, line 20, words *for seven*.—This has been thought by many an unconstitutional exertion of their authority; and the reason given is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But this has always appeared to me to be a fallacious mode of considering the subject. Before the triennial act, 6 W. & M. the duration of parliament was only limited by the pleasure or death of the king; and it never can be supposed that the next, or any succeeding parliament, had not the power of repealing the triennial act; and if that had been done, then, as before, they might have sat seventeen or seventy years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the septennial act.

CHAPTER THE THIRD.

Of the King, and his Title.

Note 1, page 200, line 30, word *interregnum*.—Hence the statutes passed in the first year after the restoration of Car. II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

Note 2, page 214, line 4, word *parliament*.—It is difficult to say in what light it was considered by that parliament, which, in the preamble to the statute, declares with nauseous pedantry, that “upon the knees of their hearts they agnise their constant faith, obedience, and loyalty to his majesty and his royal progeny.”

Note 3, page 217, line 4, word *determine*.—The convention in Scotland drew the same conclusion, viz. the vacancy of the throne, from premises and in language much more bold and intelligible.—The mystery of the declaration of the English convention, betrays that timidity which it was intended to conceal. "The estates of the kingdom of Scotland find and declare that king James Seventh, being a professed papist, did assume the royal power, and acted as a king without ever taking the oath required by law; and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of this kingdom, and altered it from a legal and limited monarchy to an arbitrary despotic power; and had governed the same to the subversion of the protestant religion and violation of the laws and liberties of the nation, inverting all the ends of government, whereby he had *forefaulted* the crown, and the throne was become vacant." *Tyndal*, 71. *Fol. Cont. of Robin*.

Note 4, page 219, line 12, word *nation*.—The preamble to the bill of rights expressly declares, that "the lords spiritual and temporal, and commons, assembled at Westminster lawfully, fully, and freely represent all the estates of the people of this realm." The lords are not less the trustees and guardians of their country, than the members of the house of commons. It was justly said, when the royal prerogatives were suspended during his majesty's illness, "that the two houses of parliament were the organs by which the people expressed their will."

CHAPTER THE FOURTH.

Of the King's royal Family.

Note 1, page 224, line 12, words 1 *Mar. I. ff. 3. c. 1*.—Mary being the first queen that had sat upon the English throne, this statute was passed, as it declares; for "the extinguishment of the doubt and folly of malicious and ignorant persons," who might be induced to think that a queen could not exercise all the prerogatives of a king.

Note 2, page 229, line 5, word *whalebone*.—The reason is more whimsical than the division; for the whalebone lies entirely in the head.

Note 3, page 229, line 17, word *repealed*.—This was a cause in the act; which attainted queen Catharine Howard and her accomplices for her incontinence; but it was not repealed till the 1 Ed. VI. c. 12. which abrogated all treasons created since the memorable statute in the 25 Ed. III.

Note 4, page 229, line 22, words 28 *Hen. VIII.*—Ann Boleyn was convicted of high treason in the court of the lord high-steward. One of the charges against this unhappy queen was, that she had said, "that the king never had had her heart;" a declaration, if made, in which there was probably more truth than discretion; but this was adjudged to be a slander of her own issue, and there-

fore high treason, according to a statute which had been passed about two years before for her honour and protection. *Harg. St. Tr.* 11 vol. p. 10.

Articles of impeachment were prepared against queen Catharine Parr for heresy, in presuming to controvert the theological doctrines of the king; but by her dexterity and address, she baffled the designs of her enemies, and regained the affections of that capricious monarch. 4 *Hume*, 259.

Articles of impeachment for high treason were exhibited against Henrietta queen of Car. I. from which she saved herself by an escape to France. 7 *Hume*, 10.

Note 5, page 230, line 5, words *not in print*.—Mr. Hargrave, in a note to Co. Litt. 133. says, that no such statute can be found. Lord Coke there refers to it by 8 Hen. VI. n^o 7. in 2 Inst. 18 by 6 Hen. VI. n^o 41. In Riley's Plac. Parl. it is called 2 Hen. VI.

Note 6, page 230, line 34, word *sisters*.—This statute perhaps was not meant to be extended to the princess royal when she had younger brothers living, for the issue of their wives must inherit the crown before the issue of the princess royal, yet their chastity is not protected by the statute.

Note 7, page 230, (last line) words *heir apparent*.—This creation has not been confined to the heir apparent, for both queen Mary and queen Elizabeth were created by their father Hen. VIII. princesses of Wales, each of them at the time (the latter after the illegitimation of Mary) being heir presumptive to the crown. 4 *Hume*, 113.

Edward II. was the first prince of Wales. When his father had subdued the kingdom of Wales, he promised the people of that country, upon condition of their submission, to give them a prince who had been born among them, and who could speak no other language.

Upon their acquiescence with this deceitful offer, he conferred the principality of Wales upon his second son Edward, then an infant. Edward, by the death of his eldest brother Alfonso, became heir to the crown, and from that time, this honour has been appropriated only to the eldest sons or eldest daughters of the kings of England. 2 *Hume*, 243.

Note 8, page 231, line 1, words *earl of Chester*.—Selden tells us, "that the earldom of Chester was once also a principality, erected into that title by parliament in 21 Rich. II. wherein it was also ordained that it should be given to the king's eldest son. But that whole parliament was repealed in the first of Hen. IV, although the earldom hath usually been since given with the principality of Wales." *Seld. Tit. of Hon.* 2. c. 5. f. 1.

Note 9, page 231, line 2, word *investiture*.—That is, by letters patent under the great seal of England.

Note 10, page 231, line 3, words *eldest son*.—The learned Commentator seems to have adopted what I am inclined to think is an error, even in the learned and accurate Selden, who says, "not only

"the first-born sons of the kings of England, but the eldest living also, are dukes of Cornwall;" *Tit. of Hon.* 2. c. 5 f. 29. and he refers to the prince's case in 8 Coke's Reports. Put the observations in that report, as well as the words of the statute, limit the Dukedom of Cornwall to the first-begotten son of a king of England, and to him only. The words of statute are, *habendum & tenendum eidem duci & ipsius et heredum suorum regum Angliæ filiis primogenitis, & dicti loci ducibus in regno Angliæ hereditarie successuris.* And lord Coke, after having enumerated those princes who had been dukes of Cornwall before his time, among whom he reckons prince Arthur, proceeds to say, "Neither was king Hen. VIII. in the life of his father, after the death of prince Arthur his brother, by force of the said creation duke of Cornwall; for although he was the sole son and heir apparent of Hen. VII. yet so far as he was not the first-begotten son, he was not within the said limitation; for prince Arthur was his first-begotten son."—But although from this it is manifest that a duke of Cornwall must be the first-begotten son of a king, yet it is not necessary that he should be born after his father's accession to the throne.

This is a strange species of inheritance, and perhaps is the only mode of descent which depends upon the authority of a statute. In the prince's case, reported by lord Coke, the question was, whether the original grant to Edward the Black Prince, who was created in the 11th of Ed. III. duke of Cornwall, and who was the first duke in England, after the duke of Normandy, had the authority of parliament, or was an honour conferred by the king's charter alone? If the latter, the limitation would have been void, as nothing less than the power of parliament can alter the established rules of descent. But notwithstanding it is in the form of a charter, it was held to be an act of the legislature. It concludes, *per ipsum regem et totum concilium in parlamento.*

Note 11, page 233, line 2, words *father's life*.—The authorities and arguments of the two dissenting judges, Price and Eyre, are so full and cogent, that if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. See *Harg. St. Tr.* 11 vol. 295.

Note 12, page 233, line 15, words *reason for it*.—The occasion of this statute was the marriage of Catharine, mother to Henry VI. with Owen Tudor, a private gentleman. See p. 223.

CHAPTER THE FIFTH.

Of the Councils belonging to the King.

Note 1, page 238, line 14, word *indefinite*.—No inconvenience arises from the extension of their numbers, as those only attend who are specially summoned for that particular occasion upon which their advice and assistance are required. The cabinet coun-

cil, as it is called, consists of those ministers of state who are more immediately honoured with his majesty's confidence, and who are summoned to consult upon the important and arduous discharge of the executive authority : their number and selection depend only upon the king's pleasure ; and each member of that council receives a summons or message for every attendance.

Note 2, page 238, line 16, word *Sbaftebury*.—It appears from the 4 Inst. 55. that this office existed in the time of Ja. 1 ; for lord Coke says, there is, and of ancient time hath been, a president of the council. This office was never granted but by letters patent under the great seal *durante beneplacito*, and is very ancient ; for John bishop of Norwich was president of the council in *anno 7 regis Johannis*. *Dormiuit tamen hoc officium regnante magnâ Elizabethâ.*

Note 3, page 239, line 3, words *in council*.—This is, in fact, a court of justice, which must consist of at least three privy counsellors.

Note 4, page 240, line 12, words *finally given*.—The court of privy council cannot decree *in personam* in England, unless in certain criminal matters ; and the court of chancery cannot decree *in rem* out of the kingdom. See Lord Hardwicke's Arg. in Pen v. Baltimore, 1 Ves. 444. where the jurisdiction of the council and chancery, upon questions arising upon subject matter abroad, is largely discussed.

CHAPTER THE SIXTH.

Of the King's Duties.

Note 1, page 243, line 8, words *a king*.—This is also well and strongly expressed in the year-books : *La ley est le plus haute inheritance que le roy ad ; car par la ley il même et tous ses sujets sont rûlés, et si de ley ne fuit, nul roi, et nul inheritance sera.*—19 Hen. VI. 63.

In English : The law is the highest inheritance which the king has ; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither king nor inheritance.

Note 2, page 244, line 22, words *kiss the book*.—And it is required both by the bill of rights, 1 W. and M. st. 2. c. 2. and the act of settlement 12 & 13 W. III. c. 2. that every king and queen of the age of 12 years, either at their coronation, or on the first day of the first parliament, upon the throne in the house of peers, (which shall first happen,) shall repeat and subscribe the declaration against popery according to the 30 Car. II. st. 2. c. 1.

CHAPTER THE SEVENTH.

Of the King's Prerogatives.

Note 1, page 251, line 7, words *sub Deo*.—What Bracton adds in the same chapter ought never to be forgotten : *Ipse autem rex non*

debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuitur igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem, non est enim rex, ubi dominatur voluntas et non lex.

Note 2, page 255, line 27, word *prejudice*.—Or perhaps it means that, although the king is subject to the passions and infirmities of other men, the constitution has prescribed no mode by which he can be made personally amenable for any wrong that he may actually commit. The law will therefore presume no wrong, where it has provided no remedy.

The inviolability of the king, is essentially necessary to the free exercise of those high prerogatives, which are vested in him, not for his own private splendour and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his subjects.

Note 3, page 257, line 7, word *occasions*.—In civil actions relating to landed property by the 9 Geo. III. c. 16. the king like a subject is limited to sixty years. See 3 vol. 307. This maxim applies also to criminal prosecutions, which are brought in the name of the king, and therefore by the common law there is no limitation in treasons, felonies, or misdemeanors. By the 7 W. III. c. 7. an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the treasonable act. 4 Vol. 351. But where the legislature has fixed no limit, *nullum tempus occurrit regi* holds true; thus a man may be convicted of murder at any distance of time within his life after the commission of the crime. This maxim obtains still in full force in Ireland. 1 *Ld. Mountm.* 365.

Note 4, page 264, line 14, word *nature*.—In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother of the Portuguese ambassador, who had been joined with him in the same commission, was tried, convicted, and executed, for an atrocious murder. Lord Hale, 1 P. C. 99. approves of the proceeding; and Mr. J. Foster (p. 188.) though a modern writer of law, lays it down that, "for murder and other offences of great enormity, which are against the light of nature, and the fundamental laws of all society, ambassadors are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are;" but Mr. Hume observes upon this case, that, "the laws of nations were here plainly violated." 7 Vol. 237. And Vattel with irresistible ability contends, that the universal inviolability of an ambassador is an object of much greater importance to the world than their punishment for crimes however contrary to natural justice. "A minister," says that profound writer, "is often charged with a commission disagreeable to the prince to whom he is sent. If this prince has any power over him, and especially if his authority be sovereign, how is it to be expected that the minister can execute his master's orders with a proper freedom of mind, fidelity, and firmness? It is necessary he should have no snares to fear, that he cannot be

* diverted from his functions by any chicanery. He must have
 " nothing to hope, and nothing to fear, from the sovereign to
 " whom he is sent. Therefore, in order to the success of his mis-
 " istry, he must be independent of the sovereign's authority, and
 " of the jurisdiction of the country both civil and criminal." B. 4.
 c. 7. s. 92. where this subject is discussed in a most luminous man-
 ner. The Romans, in the infancy of their state, acknowledged
 the expediency of the independence of ambassadors; for when
 they had received ambassadors from the Tarquin princes, whom
 they had dethroned; and had afterwards detected those embassa-
 dors in secretly committing acts which might have been considered
 as treason against their state, they sent them back unpunished;
 upon which Livy observes, *et quanquam visi sunt commississe, ut hostium*
loco essent, jus tamen gentium valuit. Lib. 2. c. 4. When Bomilcar,
qui Romam fide publicâ venerat, was prosecuted as an accomplice in
 the assassination of Massiva, Sallust declares, *fit reus magis ex æquo*
bonoque quam ex jure gentium. Bell. Jug. c. 35.

Note 5, page 265, line 7, word *determined*.—In 3 Burr. 1480.
 lord Mansfield declares, that " the statute of queen Anne was not
 " occasioned by any doubt, whether the law of nations, particularly
 " the part relative to public ministers, was not part of the law of
 " England, and the infraction criminal, nor intended to vary an iota
 " of it." And he proceeds to say, that lord Talbot, lord Hardwicke,
 and lord Holt, were clearly of the same opinion. But the infraction
 of the law of nations can only be a misdemeanor punishable at the
 discretion of the court, by fine, imprisonment, and pillory; and
 therefore lord Mansfield says, the persons convicted were never
 brought up to receive judgment; for " no punishment would have
 " been thought by the czar an adequate reparation. Such a
 " sentence as the court would have given, he would have thought
 " a fresh insult."

Note 6, page 266, line 16, words *think fit*.—Perhaps it was in-
 tended as a compliment to the czar, that the offender is deprived
 of the trial by jury; and as he is to suffer any corporal punish-
 ment that two of these three judges may think fit to inflict, the
 czar would be induced to believe, that any future requisition of
 instant death could be complied with; but as the statute has not
 made the offence felony, of course this punishment cannot extend
 to the privation of life.

Note 7, page 266, line 22, word *Middlesex*.—But he must be-
 sides be actually, and *bonâ fide* a domestic servant. 3 Burr. 1676.
 1 Wils. 20. 78.

Note 8, page 269, line 25, word *pirate*.—The statute of Hen. V.
 is confined to the time of a truce wherein there is no express men-
 tion that all marques and reprisals shall cease. This manner of
 granting letters of marque I conceive has long been disused, and
 according to the statute of Henry V. could only be granted to per-
 sons actually grieved.—But if, during a war, a subject without any
 commission from the king should take an enemy's ship, the prize

would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee the admiral. *Carth.* 399. 2 *Woodd.* 433. Therefore, to encourage merchants and others to fit out privateers or armed ships in time of war, by various acts of parliament, the lord high admiral, or the commissioners of the admiralty, are empowered to grant commissions to the owners of such ships; and the prizes captured shall be divided according to a contract entered into between the owners and the captain and crew of the privateer.—But the owners, before the commission is granted, shall give security to the admiralty to make compensation for any violation of treaties between those powers with whom the nation is at peace. And by the 24 Geo. III. c. 47. they shall also give security that such armed ship shall not be employed in smuggling. These commissions in the statutes, and upon all occasions, are now called letters of marque. 29 Geo. II. c. 34. 19 Geo. III. c. 67. *Molloy*, c. 3. s. 8. Or sometimes the lords of the admiralty have this authority by a proclamation from the king in council, as was the case in Dec. 1780, to empower them to grant letters of marque to seize the ships of the Dutch.

Note 9, page 270, line 23, word *validity*.—In order to prevent foreigners from arriving and continuing in England for the purposes of promoting sedition and confusion in this country, an act was passed 22 Geo. III. c. 4. which was to continue in force till 1st Jan. 1794, in which various restraints are imposed upon all aliens whatever.

By that statute it is directed and provided, that all masters of ships, upon their landing in England, shall declare what foreigners they have on board; and all foreigners on their arrival in an English port shall give an account of their names, rank, and occupation, and where they have principally resided for the last six months; and they shall import no arms or ammunition, except as merchandize; and they shall not depart from the place of their arrival without a passport from a magistrate.

And his majesty is empowered to order that no aliens, except alien merchants, shall be landed, or that they shall be landed at certain places or under certain regulations; and he may also order any alien to reside in a particular district, or to leave the kingdom within a limited time. For disobedience of the directions of this statute, an alien may be committed to gaol, and in some cases may be transported for life.

Note 10, page 276, line 34, word *regnum*.—It is said in lord Bacon's Ordinances, n^o 89, that "towards the latter end of the reign of king James the First this writ was thought proper to be granted, not only in respect of attempts prejudicial to the king and state, (in which case the lord chancellor granted it on application from any of the principal secretaries, without shewing cause, or upon such information as his lordship should think of weight,) but also in the case of interlopers in trade, great bank-

"rupts, in whose estates many subjects might be interested, in
 "duels, and in other cases that did concern multitudes of the
 "king's subjects."

But in the year 1734, lord chancellor Talbot declared that
 "in his experience he never knew this writ of *ne exeat regni*
 "granted or taken out, without a bill first filed—It is true, it
 "was originally a state writ, but for some time, though not very
 "long, it has been made use of in aid of the subjects for the help-
 "ing of them to justice; but it ought not to be made use of where
 "the demand is entirely at law, for there the plaintiff has bail,
 "and he ought not to have double bail, both in law and equity."
 3 P. Wms. 312.

The use and object of this writ of *ne exeat regno* in chancery at
 present is exactly the same as an arrest at law in the commence-
 ment of an action, viz. to prevent the party from withdrawing his
 person and property beyond the jurisdiction of the court, before a
 judgment could be obtained and carried into execution; so where
 there is a suit in equity for a demand, for which the defendant
 cannot be arrested in an action at law, upon an affidavit made
 that there is reason to apprehend that he will leave the kingdom
 before the conclusion of the suit, the chancellor by this writ will
 stop him, and will commit him to prison, unless he produces suf-
 ficient sureties that he will abide the event of the suit. See 2 Com.
 Dig. 312.

Note 11, page 277, line 1, words *his return*.—The exercise of
 this prerogative has been long disused, and it is probable that it
 will never be resumed. For the ancient learning upon it, see 3
 Inst. c. 84. against fugitives.

Note 12, page 278, line 3, words *party and party*.—See 3 vol. 41.

Note 13, page 278, line 23, words *vacate their seats*.—All their
 commissions became vacant upon the demise of the crown, till
 they were continued for six months longer by 1 Ann. stat. 1. c. 8.
 When his majesty was pleased to make the memorable declaration
 in the text, he introduced it by observing; "Upon granting new
 "commissions to the judges, the present state of their offices fell
 "naturally under consideration. In consequence of the late act,
 "passed in the reign of my late glorious predecessor William the
 "Third, for settling the succession to the crown in my family,
 "their commissions have been made during their good behaviour;
 "but notwithstanding that wise provision, their offices have de-
 "termined upon the demise of the crown, or at the expiration of
 "six months afterwards in every instance of that nature which has
 "happened."

Note 14, page 280, (last line) words *plaintiff in court*.—But the
 attorney-general may enter a *non vult prosequi*, which has the effect
 of a nonsuit. Co. Litt. 139.

Note 15, page 283, line 20, words *his subjects*.—The king by the
 common law could have created a duke, earl, &c. and could have

given him precedence before all others of the same rank, a prerogative not unfrequently exercised in ancient times; but it was restrained by the 31 Hen. VIII. c. 10. which settles the place or precedence of all the nobility and great officers of state. This statute does not extend to Ireland, where the king still retains his prerogative without any restriction, except the dread of the unpopularity which would now result from the exertion of it.

Note 16, page 287, line 7, word *multitude*.—The regulation of weights and measures cannot with propriety be referred to the king's prerogative; for from *magna charta* to the present time there are above twenty acts of parliament to fix and establish the standard and uniformity of weights and measures. Two important cases upon this subject, have lately been determined by the court of king's bench; one was, that although there had been a custom in a town to sell butter by eighteen ounces to the pound, yet the jury of the court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight. 3 T. R. 271. In the other it was determined, that no practice or usage could countervail the statutes 22 Car. II. c. 8. and 22 & 23 Car. II. c. 12. which enact, that if any person shall either sell or buy grain or salt by any other measure than the Winchester bushel, he shall forfeit forty shillings, and also the value of the grain or salt so sold or bought; one half to the poor, the other to the informer. *The King and Major*, 4 T. R. 750.

Note 17, page 288, line 6, words *the whole*.—In considering the prices of articles in ancient times, regard must be always had to the weight of the shilling, or the quantity of silver which it contained at different periods. From the conquest till the 20th year of Ed. III. a pound sterling was actually a pound troy weight of silver, which was divided into twenty shillings; so if ten pounds at that time were the price of a horse, the same quantity of silver was paid for it as is now given, if its price is thirty pounds.

This therefore is one great cause of the apparent difference in the prices of commodities in ancient and modern times. About the year 1347, Edw. III. coined twenty-two shillings out of a pound; and five years afterwards he coined twenty-five shillings out of the same quantity. Henry V. in the beginning of his reign, divided the pound into thirty shillings, and then of consequence each shilling was double the weight of a shilling at present. Henry VII. increased the number to forty, which was the standard number till the beginning of the reign of Elizabeth. She then coined a pound of sterling silver into sixty-two shillings, which division has ever since remained without alteration; so every ounce of coined silver since that time has been equal to five shillings and two pence. (*See MONEY in the Index to Hume's Hist.*) Dr. Adam Smith, at the end of his first volume, has given tables specifying the average prices of wheat for five hundred and fifty years back, and has reduced for each year the money of that time into the money of the

present day. But in his calculation he has called the pound since Elizabeth's time sixty shillings. Taking it at that rate, we may easily find the equivalent in modern money of any sum in ancient time, if we know the number of shillings which weighed a pound, by this simple rule: As the number of shillings in a pound at that time is to sixty, so is any sum at that time to its equivalent at present; as for instance, in the time of Hen. V. as thirty shillings are to sixty shillings now, so ten pounds then were equal to twenty pounds of the present money. The increase in the quantity of the precious metal does not necessarily increase the price of articles of commerce; for if the quantities of these articles are augmented in the same proportion as the quantity of money, it is clear there will be the same use, demand, or price for money as before, and no effect will be produced in the price of commodities.

If gold and silver could have been kept in the country, the immense increase of paper currency, or substitution of paper for coin, would have diminished its value, and have increased the prices of labour and commodities far beyond the effect that has been produced by the discovery of the mines in America. The effect they have produced is general, and extended to the whole world; but the increase of our paper has only a tendency to lessen the value of money at home, which never can take place to any great degree, as it will naturally seek a better market, or be carried where more will be given for it; and by the substitution of a cheaper medium of commerce, the difference in value is added to the capital or to the real strength of the nation. Gold and silver form an insignificant part of the real wealth of a commercial country. The whole quantity of specie has been estimated at about twenty millions only, not much more than what is raised in one year for the support of government.

Note 18, page 288, line 26, words *5s. 2d. an ounce*.—This was a clause in a temporary act, which was continued till 1783, since which time I do not find that it has been revived.

Note 19, page 289, (note,) words *sixty two shillings*.—Dr. Adam Smith, in his inestimable work, the Inquiry into the Nature and Causes of the Wealth of Nations, 1 vol. p. 39. tells us that the "English pound sterling in the time of Edw. I. contained a pound Tower-weight of silver of a known fineness. The Tower pound seems to have been something more than the Roman pound, and something less than the Troyes pound. This last was not introduced into the mint of England till the 18th of Hen. VIII. The French livre contained in the time of Charlemagne a pound Troyes weight of silver of a known fineness. The fair of Troyes in Champaign was at that time frequented by all the nations of Europe, and the weights and measures of so famous a market were generally known and esteemed."

Note 20, page 289, (note,) words *modern Europe*.—Camden, in his description of Scotland, says, that it has been erroneously supposed that the word *sterling* comes from Stirling in Scotland.

A Germanis enim, quos Angli Eſterlingi ab orientali ſitu vocarunt, facta eſt appellatio, quos Johannes rex ad argentum in ſuam puritatem redigendum primus evocavit, et ejusmodi nummis Eſterlingi in antiquis ſcriptis ſemper conſpiciuntur. R. 11.

Note 21, page 289, line 15, words *ſir Matthew Hale*.—Lord Hale refers to the caſe of mixed money in Davies's Report, 48. in ſupport of his opinion. A perſon in Ireland had borrowed 100*l.* of ſterling money, and had given a bond to repay it on a certain future day. In the mean time queen Eliz. for the purpoſe of paying her armies and creditors in Ireland, had coined mixed or baſe money, and by her proclamation had ordered it to paſs current, and had cried down the former coin. The debtor on the appointed day tendered 100*l.* in this baſe coin; and it was determined upon great conſideration that it was a legal tender, and that the lender was obliged to receive it: natural equity would have given a different deciſion.

This act of queen Elizabeth does but ill correſpond with the flattering inſcription upon her tomb: *Religio reſormata, pax fundata, moneta ad ſuum valorem reduſta, &c.* 2. Inſt. 578.

Note 22, page 290, line 3, words *no longer current*.—All officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation 14 Geo. III. c. 70. And by 13 Geo. III. c. 1. any perſon may cut counterfeit gold money, or what has been unlawfully diminiſhed.

Note 23, page 290, line 20, words *1 Eliz. c. 1*.—As queen Mary by 1 & 2 Ph. & M. c. 8. had repealed all the ſtatutes made in the time of her father derogatory to the ſee of Rome, and had fully re-inſtated the Pope in all his former power and juriſdiction in this country; queen Elizabeth, to ſhew her attachment to the proteſtant cauſe, by the firſt parliamentary act of her reign repealed this ſtatute of queen Mary, and revived all the ſtatutes relating to the church paſſed in the time of Henry VIII. This proves how little at that time depended upon the authority of parliament, which could accede to ſuch immenſe revolutions in the courſe of four or five years.

Note 24, page 291, line 12, word *convocation*.—From the learned Commentator's text, the ſtudent would perhaps be apt to ſuppoſe that there is only one convocation at a time. But the king, before the meeting of every new parliament, directs his writ to each arch-biſhop, to ſummon a convocation in his peculiar province.

Godolphin ſays, that the convocation of the province of York, conſtantly correſponds, debates, and concludes the ſame matters with the provincial ſynod of Canterbury. God: 99. But they are certainly diſtinct and independent of each other; and when they uſed to tax the clergy, the different convocations ſometimes granted different ſubſidies. In the 22 Hen. VIII. the convocation of Canterbury had granted the king one hundred thouſand pounds; in conſideration of which an act of parliament was paſſed, granting

a free pardon to the clergy for all spiritual offences, but with a proviso that it should not extend to the province of York, unless its convocation would grant a subsidy in proportion, or unless its clergy would bind themselves individually to contribute as bountifully. This statute is recited at large in *Gib. Cod.* 77.

All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative, and the parochial clergy in each diocese in Canterbury two proctors; but on account of the small number of dioceses in the province of York, each archdeaconry elects two proctors. In York the convocation consists only of one house; but in Canterbury there are two houses, of which the twenty-two bishops form the upper house; and before the reformation, abbots, priors, and other mitred prelates, sat with the bishops. The lower house of convocation in the province of Canterbury, consists of twenty-two deans, fifty-three archdeacons, twenty-four proctors for the chapters, and forty-four proctors for the parochial clergy. By 8 Hen. VI. c. 1. the clergy in their attendance upon the convocation have the same privilege in freedom from arrest as the members of the house of commons in their attendance upon parliament. *Burn. Conv.* 1 B. c. 6. *Akr.* 610.

Note 25, page 291, (last line) word *hereafter*.—By that statute it is declared, that for the future no appeals from the ecclesiastical courts of this realm should be made to the Pope, but that an appeal from the archbishop's courts should lie to the king in chancery: upon which the king, as in appeals from the admiral's court, should by a commission appoint certain judges or delegates finally to determine such appeals. 3 vol. 66.

CHAPTER THE EIGHTH.

Of the King's Revenue.

Note 1, page 294, line 8, words *was installed*.—But queen Elizabeth kept the see of Ely vacant 19 years, in order to retain the revenue. *Sirype*, 4 vol. 351.

Note 2, page 296, line 18, words *at present rated*.—When the first-fruits and tenths were transferred to the crown of England by 26 Hen. VIII. c. 3. at the same time it was enacted, that commissioners should be appointed in every diocese, who should certify the value of every ecclesiastical benefice and preferment in the respective dioceses; and according to this valuation, the first fruits and tenths were to be collected and paid in future. This *valor beneficiorum* is what is commonly called the King's Books: a transcript of which is given in Ecton's *Thesaurus*, and Bacon's *Liber Regis*.

Note 3, page 296, line 27, words *and not otherwise*.—The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bish-

opric; but other dignitaries in the church pay theirs in the same manner as rectors and vicars.

Note 4, page 296, line 33, words *first-fruits and tenths*.—After queen Anne had appropriated the revenue arising from the payment of first-fruits and tenths to the augmentation of small livings, it was considered a proper extension of this principle to exempt the smaller livings from the incumbrance of those demands; and, for that end, the bishops of every diocese were directed to inquire and certify into the exchequer what livings did not exceed 50*l.* a year according to the improved value at that time; and it was further provided, that such livings should be *discharged* from those dues in future.

Note 5, page 297, line 13, words *subsequent statutes*.—These trustees were erected into a corporation, and have authority to make rules and orders for the distribution of this fund. The principal rules they have established are, that the sum to be allowed for each augmentation, shall be 200*l.* to be laid out in land, which shall be annexed forever to the living; and they shall make this donation, first, to all livings not exceeding 10*l.* a year; then to all livings not above 20*l.*; and so in order, whilst any remain under 50*l.* a year. But when any private benefactor will advance 200*l.* the trustees will give another 200*l.* for the advancement of any living not above 45*l.* a year, though it should not belong to that class of livings which they are then augmenting. 2 *Burn. Ec. L.* 260.

Though this was a splendid instance of royal munificence, yet its operation is slow and inconsiderable; for the number of livings certified to be under 50*l.* a year, was no less than 5597, of which 2538 did not exceed 20*l.* a year each, and 1933 between 30*l.* and 50*l.* a year, and the rest between 20*l.* and 30*l.*; so that there were 5597 benefices in this country, which had less than 23*l.* a year each upon an average. Dr. Burn calculates that from the fund alone, it will require 339 years from the year 1714, when it commenced, before all these livings can be raised to 50*l.* And if private benefactors should contribute half as much as the fund, (which is very improbable,) it will require 226 years. But even taking this supposition to have been true ever since the establishment, it will follow, that the wretched pittance from each of 5597 livings, both from the royal bounty and private benefaction, cannot upon an average have yet been augmented 9*l.* a year. 2 *Burn. E. L.* 268. Dr. Burn, in this calculation, computes the clear amount of the bounty to make 55 augmentations yearly, that is, at 11,000*l.* a year; but Sir John Sinclair, Hist. Rev. 3 part, 198. says, that "this branch of the revenue amounted to about 14,000*l.* per annum; and on the 1st of January, 1735, the governors of that charity possessed, besides from savings and private benefactions, the sum of 150,500*l.* of old South Sea annuities, and 4857*l.* of cash, in the hands of their treasurer: the state of that fund has of late years been carefully concealed; but it probably yields, at present, from 40 to 50 thousand pounds per annum." This con-

jecture must certainly be very wide of the truth of the case; for the source of this fund is fixed and permanent, except the variation depending upon the contingency of vacancies, which will be more or fewer in different years. And what object can the commissioners have in the accumulation of this fund? For that accumulation can only arise by depriving the poor clergy of the assistance which was intended them, and to enrich the successor at the expense of the wretched incumbent of the present day. The condition of the poor clergy in this country certainly requires some further national provision. Neither learning, religion, nor good morals, can secure poverty from contempt in the minds of the vulgar. The immense inequality in the revenues of the ministers of the gospel, not always resulting from piety and merit, naturally excite discontent and prejudices against the present establishment of the church. If the whole of the profits and emoluments of every benefice for one year were appropriated to this purpose, an effect would be produced in 20 or 30 years, which will require 300 by the present plan. This was what was originally understood by the first fruits, and what actually, within the last 300 years, was paid and carried out of the kingdom to support the superstition and folly of popery. If upon any promotion to a benefice it was provided that there should be no vacancy or cession of former preferment till the end of the year, who could complain? The person promoted would be deprived of no right or property which he had previously enjoyed: and even if there were any minds so sanguine as to consider themselves certain of success, it would be but a temporary disappointment of their hopes: and taxes are never paid with so much cheerfulness and alacrity as upon the accession of good fortune. It would certainly soon yield a supply which would communicate both comfort and respectability to the indigent clergy.

Note 6, page 298, line 12, words *leases come to expire*.—By the 26 Geo. III. c. 87. amended by 30 Geo. III. c. 50. commissioners were appointed to inquire into the state and condition of the woods, forests, and land revenues belonging to the crown, and to sell fee farm and other unimproveable rents.

Note 7, page 301, line 15, words 8 *Car. I.*—This was one of the odious modes adopted by Car. I. to raise a revenue without the aid of parliament.

Note 8, page 302, line 25, words *the same reason*.—I should rather presume that this prerogative was founded upon general principles of policy and convenience; for if every person was permitted to carry home what he found upon the sea coast, the true owner would stand a very poor chance of recovering back his property: therefore, for the benefit of the owner, the law places it in the custody of the sheriff or a public officer of the crown, where it will be preserved safely and honestly, and to whom the owner is directed to make inquiries for the property he has lost.—And at a time when a rightful claimant is despaired of, it is very properly applied to the augmentation of the public revenue.

Note 9, page 308, line 18, words *or finder*.—This certainly is true, though it cannot be reconciled with the learned judge's doctrine, that all *bona vacantia* belong to the king. See p. 311.

Note 10, page 310, line 9, words *may have done therein*.—This reason is not very satisfactory; for the king being the *ultimus hæres* of all the land in the kingdom, they must do the same injury to his interest, whether they are grazing in one place or another out of the king's domains. But the law is probably founded upon general policy; for by giving the estray to the king, or his grantee, and not to the finder, the owner has the best chance of having his property restored to him; and it lessens the temptation to commit thefts, as it prevents a man from pretending that he had found an estray, what he had actually stolen; or according to the vulgar phrase, that he had found what was never lost.

Note 11, page 310, line 27, words *proclaiming them*.—But if any other person finds and takes care of another's property, not being entitled to it as an estray, the owner may recover it or its value, without being obliged to pay the expenses of keeping. 2 Bl. Rep. 1117.

Note 12, page 311, (last line) word *gentium*.—This cannot be reconciled with what the learned Judge has advanced in p. 307, viz. that if "any thing be found in the sea, or upon the earth, it doth not belong to the king, but the finder, if no owner appears." That certainly is the law of England; and which, with deference to the learned Judge, is the general rule with regard to all *bona vacantia*, except in the particular instances in which the law has given them to the king. Those instances are exceptions, which prove the rule, for *expressio unius est exclusio alterius*. See the case of *Armory v. Delamirie* in *Strange*, 505, where a chimney sweeper's boy recovered from a goldsmith, who detained from him a diamond which he had found, the value of the finest diamond which would fit the socket from which it was taken. And it was clearly held, that the boy had a right to it against all the world, except the owner, who did not appear. And I cannot but think that the learned Judge has misconceived the sentence in *Bracton*, which is this: *Item de hiis, quæ pro wayvio habentur, sicut de averiis, ubi non apparet dominus, et quæ olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium*. Here the *quæ* refers only to the two antecedents *wayvia* and *averia*, or perhaps to *averia* only: by which construction the sentence is consistent, and the whole correct. But if it had been intended that it should be understood as if *omnia* had preceded *quæ*, it would have been superfluous to have instanced *averia*, and the sentence would certainly have been erroneous.

Note 13, page 314, line 5, words *of the republic*.—This was one of *Draco's* laws; and perhaps we may think the judgment, that a statue should be thrown into the sea for having fallen upon a man, less absurd, when we reflect that there may be sound policy in teaching the mind to contemplate with horror the privation of human life, and that our familiarity even with an insensible object which has

been the occasion of death. may lessen that sentiment. Though there may be wisdom in withdrawing such a thing from public view, yet there can be none in treating it as if it was capable of understanding the ends of punishment.

Note 14, page 315, line 9, words *unequitable a claim*.—But would it not be much better that laws should be abolished, the policy of which has long ceased, and at which the understandings of mankind so strongly revolt, that juries are inclined to trifle with their oaths, and judges to encourage ridiculous distinctions, which tend to bring the general administration of justice into contempt?

Note 15, page 316, line 17, word *disinherited*.—The jurisdiction which the chancellor has generally, or perhaps always, exercised over the persons and estates of lunatics and idiots, is not necessarily annexed to the custody of the great seal; for it has been declared by the house of lords, "that the custody of idiots and lunatics was in the power of the king, who might delegate the same to such person as he should think fit." And upon every change of the great seal, a special authority under his majesty's royal sign manual is granted to the new chancellor for that purpose. Hence no appeal lies from the chancellor's orders upon this subject to the house of lords, but to the king in council. *Dom. Proc.* 14 Feb. 1726. 3 P. Wms. 108.

Note 16, page 318, line 14, words 19 *Geo. III.*—And made perpetual by 26 Geo. III. c. 91. By that statute no person shall confine more than one lunatic in a house kept for the reception of lunatics, without an annual license from the college of physicians or the justices in sessions, under a penalty of 500*l.* And if the keeper of a licensed house receive any person as a lunatic, without a certificate from a physician, surgeon, or apothecary, that he is a fit person to be received as a lunatic, he shall forfeit 100*l.*

Note 17, page 315, (note) words *Scobell's collection*.—Sir John Sinclair has given the proportions to be levied upon each county of an assessment of 70,000*l.* a month in the year 1660, in his history of the Public Revenue, 1 part, 189.

Note 18, page 326, line 6, words *supplies in that manner*.—No subsidies were granted either by the laity or clergy after 1663, 15 Car. II. c. 9. and 10. The learned Judge has been misled by the title to the act of the 22 and 23 Car. II. c. 3. in the year 1670, when he declares it was the last time of raising supplies by way of subsidy; for the title of it is, "An act to grant a subsidy to his majesty for supply of his extraordinary occasions." But although among a great variety of other taxes, 1*s.* in the pound is to be raised upon land, yet the mode of collecting it is totally different from the former subsidy assessment: it is to be levied by exactly the same plan and arrangements which were afterwards adopted in 4 W. and M. And according to the regulations in the statute 4 W. and M. c. 1. and the valuation of estates made at that

time, the parliament every year at present renews the grant of the land tax, and orders it to be collected. All the material clauses of the statute in the 22 and 23 Car. II. are copied *verbatim* in that of the 4 W. and M.; the act of Charles is not printed in the common edition of the Statutes at Large, but it is given at length in Keble's edition. And even then this scheme of taxing landed property was not a novelty, for it was first introduced in the time of the commonwealth. The substance of this plan may be seen in an act for an assessment to raise 60,000*l.* a month in Scobell's acts, 1656, c. 12.

To those who have leisure and opportunity, it might afford entertainment to inquire what was the difference of the assessments returned into the exchequer in the years 1656, 1670, and 1692. For besides the present disproportion in the assessment necessarily arising from a more improved cultivation of land in some counties, it is commonly supposed that there was an original inequality in the valuation of estates, from the liberality or fraud of the owners and assessors, in their representations of the value, according to their attachment or aversion to the new government.

Note 19, page 326, (last line) words *and their officers*.—The commissioners are appointed annually in the renewed act; but they cannot execute the office in any county, except in Wales, under a penalty of 50*l.* unless they have some estate or interest in land within the county, of the clear value of 100*l.* a year, and which was taxed for that sum, at the least, the year before. The assessors and collectors are principal inhabitants, appointed by the commissioners. See the particular provisions of the statute in Burn's Justice, title *Land Tax*.

Note 20, page 327, line 13, figures 1779.—And in the next year, a further additional duty of 6*d.* a bushel was laid upon malt. But by the consolidation act, 27 Geo. III. c. 13. these duties are repealed: and, in lieu of them, 9*d.* is laid upon every bushel of malt in England, and half as much in Scotland. Sir John Sinclair states, that from Michaelmas 1787, to Michaelmas 1788, the net produce of the perpetual excise upon malt was 724,786*l.*; the annual excise 603,317*l.*; the duties upon beer 1,666,152*l.*; upon British spirits 509,167*l.*: so that barley yielded a clear revenue of 3,503,422*l.* 3 *Sinc.* 125.

Note 21, page 327, line 16, words *worth collecting*.—Though the land-tax is supposed, and stated in the annual act, to raise, at 4*s.* in the pound, an income of 1,989,673*l.* 7*s.* 10½*d.* for England; and 47,954*l.* 1*s.* 2*d.* for Scotland; making in all, 2,037,627*l.* 9*s.* 0½*d.*, yet Sir John Sinclair shews, with great appearance of accuracy, that it is so uniformly deficient, that, upon an average, the whole amount ought not to be estimated at more than 1,900,000*l.* and that the annual malt tax, after two very favourable years, ending at Michaelmas 1788, did not average more than 600,000*l.* 3 *Part,* 108. 117.

Note 22, page 327, line 33, words *now extant*.—Sir Edward Coke cites a letter patent of Edw. I. in which the king recites, that the parliament had granted to him and his heirs *quadam nova consuetudo* upon wool, skins, and leather: but that merchants paid duties and customs long before, appears from the memorable clause in *magna charta*, upon which sir Edward Coke is there commenting: that clause provides, that all merchants shall have safe conduct throughout England, *ad emendum & vendendum sine omnibus malis tolnctis, per antiquas & rectas consuetudines*: and he says, these are subsidies or customs granted by common consent *pro bono publico*. 2 Inst. 58. They seem to have been called customs, from having been paid from time immemorial; and a memorable statute in the 21 Edw. I. c. 5. makes that distinction. It states, that several people are apprehensive that the aids, tasks, and prizes, which they had granted for the king's wars and other occasions, might be turned upon them and their heirs (*en fervice*) into an act of slavery; the king therefore declares and grants, that he will not draw such temporary aids and taxes into a *custom*.

This is a striking and a noble instance of a jealous spirit of liberty in our ancestors, and that they were anxious to preserve those rights which, by *magna charta*, they had successfully vindicated.

Lord Coke, both in 2 Inst. 58, and in 4 Inst. 29, 30. shews from the authorities he cites, that customs or duties were called in old legal Latin *custuma* and *consuetudines* indiscriminately. But he seems very desirous of inculcating the doctrine, that all customs or duties owe their origin to the authority of parliament; a doctrine, which both before and after his time, the crown was inclined to controvert.

Note 23, page 330, line 31, words *additions have been made*.—In the year 1787, by the 27 Geo. III. c. 13. called the consolidation act, all the former statutes imposing duties of customs and excise were repealed with regard to the *quantum* of the duty; and the two books of rates, mentioned by the learned Judge, were declared to be of no avail for the future; but all the former duties were consolidated, and were ordered to be paid according to a new book of rates annexed to that statute. Before this act was passed, it could not be supposed that many persons, beside excisemen and custom-house officers, could be acquainted with the duties payable upon the different articles of commerce. Sir John Sinclair says, that French wine was liable to fifteen, and French paper to fourteen, different duties, which, of course, lay widely dispersed in so many acts of parliament. But now, by this excellent improvement, we can immediately find the duty upon the importation or exportation of any article; or what excise duty any commodity is subject to, in an alphabetical table. Bullion, wool, and some few other commodities, may be imported duty free. All the articles enumerated in the tables or book of rates, pay, upon importation or exportation, the sum therein specified, according to their weight, number, or measure. And all other goods and merchandize, not being particularly enumerated or described, and permitted to be imported and

used in Great Britain, shall pay upon importation, *27l. 10s. per cent. ad valorem*, or for every 100*l.* of the value thereof; but subject to a drawback of *25l. per cent.* upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not specified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and shipped; but on failure thereof they are subject to a duty of *5l. 10s. per cent. ad valorem*. And to prevent frauds in the representation of the value, a very simple and equitable regulation is prescribed by the act, *viz.* the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price which he himself fixed upon them, with an advance of *ten per cent.* besides all the duty which he may have paid; and they may then order the goods to be publicly sold, and if they raise any sum beyond what was paid to the owner and the subsequent expenses, one half of the overplus shall be paid to the officer who made the seizure, and the other half to the public revenue. This statute is of infinite consequence to the commercial part of the world; it has reduced an important subject from a perfect chaos to such a plain and simple form, as to induce every friend to his country to wish that similar experiments were made upon other confused and entangled branches of our statute law.

Note 24, page 330, (last line) word *naturalization*.—By the 24 Geo. III. sess. 2. c. 16. it was enacted, that the petty custom, or additional duty on all the goods of aliens or strangers, should cease, except those which had been granted to the city of London. The city of London still retains a trifling duty, called *scavage*, on the goods of aliens. It is an odious and impolitic tax; and it would be honourable to the city of London to adopt the liberality of the legislature, and to relinquish it.

Note 25, page 332, line 29, words *other branches of revenue*.—Sir John Sinclair has calculated that the expense of collecting the duties of excise is *5½ per cent.* the customs *10½*, stamps *3½*, salt *6½*, and the land-tax, less than *3 per cent.* and that the average expense of collecting the whole revenue is *7½ per cent.* *Hist. Rev.* 3 part, 162.

Note 26, page 333, line 19, words *disregard of the common law*.—See the jurisdiction of the commissioners and justices of the peace in cases of excise in Burn's Justice, title *Excise*. The grievances of the excise perhaps exist more in apprehension than in reality. Actions and prosecutions against officers, commissioners, and justices, for misconduct in excise cases, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet perhaps it is more than equivalent to the public at large, that, by the survey of the excise, the commodity is preserved from many shameful adulterations, as experience has fully proved since wine was made subject to the excise laws.

Note 27, page 335, (last line) words 26 *Geo. II.*—For particular regulations respecting the duty on salt, see Burn's Just. title *Excise, Salt*.

Note 28, page 337, line 22, words *and his parliament*.—The preamble of the ordinance states that the establishing one general post-office, besides the benefit to commerce, and the convenience of conveying public dispatches, "will be the best means to discover and prevent many dangerous and wicked designs against the commonwealth."

The policy of having the correspondence of the kingdom under the inspection of government is still continued; for, by a warrant from one of the principal secretaries of state, letters may be detained and opened; but if any person shall wilfully detain or open a letter delivered to the post-office without such authority, he shall forfeit 20*l.* and be incapable of having any future employment in the post-office. 9 *Ann. c.* 10. *s.* 40. But it has been decided, that no person is subject to this penalty but those who are employed in the post-office. 5 *T. R.* 101.

Note 29, page 338, line 8, words *the members*.—The following account of it in the 23 vol. *Parl. Hist.* p. 56. is curious, and proves what originally were the sentiments of the two houses respecting this privilege. "Colonel Titus reported the bill for the settlement of the post-office, with the amendments: Sir Walter Carle delivered a proviso for the letters of all members of parliament to go free, during their sitting: Sir Heneage Finch said, It was a *poor mendicant proviso*, and below the honour of the house. Mr. Prynne spoke also against the proviso: Mr. Bunckley, Mr. Boscawen, Sir George Downing, and Serjeant Charlton, for it; the latter saying, "The council's letters went free." The question being called for, the speaker, Sir Harbottle Grimstone, was unwilling to put it; saying, *he was ashamed of it*; nevertheless the proviso was carried, and made part of the bill, which was ordered to be engrossed." This proviso the lords disagreed to, and left it out of the bill; and the commons agreed to their amendment. 3 *Hist.* 82.

Note 30, page 338, line 14, word *franking*.—And that the great loss to the public revenue by the exercise of this privilege might be farther diminished, the 24 *Geo. III.* sess. 2. c. 37. provides, that no letter shall go free, unless the member shall write the whole of the superscription, and shall add his own name, and that of the post-town from which the letter is intended to be sent, and the day of the month in words at length, besides the year, which may be in figures; and unless the letter shall be put into the post-office of the place, so that it may be sent on the day upon which it is dated. And no letter shall go free directed to a member of either house, unless it is directed to him where he shall actually be at the delivery thereof; or to his residence in London, or to the lobby of his house of parliament. And if any person shall fraudulently counterfeit or alter such superscription, he shall be guilty of felony, and shall be transported for seven years.

Note 31, page 338, line 23, word *existed*.—It was determined so long ago as the 13 W. III. by three of the judges of the court of King's Bench, though contrary to the pertinacious opinion of lord C. J. Holt, that no action could be maintained against the postmaster-general, for the loss of bills or articles sent in letters by the post. 1 *Ld. Raym.* 646. *Comyns*, 100, &c. A similar action was brought against lord le Despencer and Mr. Carteret, postmasters-general, in 1778, to recover a bank-note of 100*l.* which had been sent by the post and was lost. Lord Mansfield delivered the opinion of the court, and proved, with such perspicuity and ability, that there was no resemblance or analogy between the postmasters and a master carrier, and that no action for any loss in the post-office could be brought against any person, except him by whose actual negligence the loss accrued, that this point seems as fully established, as if it had been declared by the full authority of parliament. *Corop.* 754.

For this reason it is recommended, by the secretary of the post-office, to cut bank-notes, and to send one half at a time. This is the only safe mode of sending bank-notes, as the bank would never pay the holder of that half which had been fraudulently obtained.

Many attempts have been made by postmasters in country towns, to charge a halfpenny or a penny a letter upon delivery at the houses in the town above the parliamentary rates, under pretence that they were not obliged to carry the letters out of the office *gratis*; but it has been repeatedly decided, that such a demand is illegal, and that they are bound to deliver the letters to the inhabitants within the usual and established limits of the town, without any addition to the rate of postage. 5 *Burr.* 2709. 2 *Bl. Rep.* 906. *Corop.* 182.

Note 32, page 339, line 26, word *advantage*.—It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in favour of the revenue. This rule is agreeable to good policy and the public interests; but, beyond that, which may be regarded as established law, no one can ever be said to have an undue advantage in our courts.

Note 33, page 339, line 31, words *original amount*.—And perhaps by ten different acts of parliament. It is certainly true, that the ~~items~~ of seven different long statutes must be picked out and summed up, to produce the present stamp-duty upon an indenture, lease, or bond. One cannot but express surprise, that each new stamp-act has not consolidated the duties imposed upon the respective articles by former statutes. When a deed or instrument is produced in court, no one can say whether it is duly stamped or not, but by collecting together, with a great probability of an error, all the duties which lie dispersed in the various stamp-acts prior to its date.

If each stamp-act declared the whole amount of the stamp at the time, it would prevent much confusion and vexation in a subject of the highest importance. But till this plan is adopted by the legislature, Dr. Burn, in the title *Stamps*, and Kearsley, in his useful *Stamp Duty Tax-tables*, will be our readiest, if not our surest, guides.

Note 34, page 341, line 6, words *land tax*.—If the house, offices, and gardens are worth from 5*l.* to 20*l.* the occupier shall pay 6*d.* in the pound; if from 20*l.* to 40*l.* 9*d.*; if 40*l.* or upwards, 1*s.* in the pound. Farm-houses and cottages are excepted.

These duties shall be paid over and above 3*s.* a year, which by the 6 Geo. III. c. 38. was payable for every house (except by persons exempted from their poverty:) but by the 32 Geo. III. c. 2. this tax of 3*s.* shall not be paid for any house with less than 7 windows.

Besides these duties, there must be paid the tax upon windows imposed by 6 Geo. III. c. 38. and the additional tax introduced by the commutation act the 24 Geo. III. sess. 2. c. 38.

The old duty upon windows by 6 Geo. III. c. 38. upon every house with

		<i>s.</i>	<i>d.</i>
7	windows is	0	2 each
8	—	0	6
9	—	0	8
10	—	0	10
11	—	1	0
12	—	1	2
13	—	1	4
14, 15, 16, 17, 18, 19,	—	1	6
20	—	1	7
21	—	1	8
22	—	1	9
23	—	1	10
24	—	1	11
25 and upwards	—	2	0

The additional tax by the commutation act for every house with

		<i>l.</i>	<i>s.</i>	<i>d.</i>
7	windows is	0	6	0
8	—	0	8	0
9	—	0	10	6
10	—	0	13	0
11	—	0	15	6
12	—	0	18	0
13	—	1	1	0
14	—	1	5	0
from 14 to 25 each number increases by 5 <i>s.</i>				
from 25 to 29 inclusive				
4	0	0		
30 to 34	4	10	0	
35 to 39	5	0	0	
thus increasing by 1 <i>l.</i>				
95 to 99	11	0	0	
100 to 109	12	0	0	
110 to 119	13	0	0	
thus increasing by 1 <i>l.</i>				
120 & upwards	20	0	0	

See this subject more fully stated in Burn, tit. *Houfe*.

Note 35, page 341, line 15, words *land and window tax*.—By the 25 Geo. III. c. 43. the former taxes upon servants were repealed, and the following were enacted:

	<i>l.</i>	<i>s.</i>
For 1 male servant	1	5 per annum.
2	1	5 each.
3 or 4,	1	10
5, 6, or 7,	1	15
8, 9, or 10,	2	0
11 or more	3	0

And every bachelor above the age of 21 shall pay 1*l.* 5*s.* for each male servant he keeps in addition to the above taxes.

Note 36, page 342, line 2, words *tolerable order*.—In the year 1770 one thousand hackney coaches were licensed, for each of which the proprietors paid a tax of 5s. a week; by the 24 Geo. III. sess. 2. c. 27. that duty was doubled; so from this article government derives a revenue of 26,000*l.* a year. In consequence of so great an increase in the duty upon them, the fares were altered by 26 Geo. III. c. 7. and were thus fixed: For any distance not exceeding one mile and a quarter 1*s.* beyond that and not exceeding two miles 1*s.* 6*d.* and for every half mile beyond that 6*d.* more, for ten miles from London or Westminster; which distance they may be compelled to go every day at a seasonable hour; and what is a seasonable hour is explained by 32 Geo. III. c. 47. But if the coachman is kept waiting, he may, if he chooses, demand his fare according to the time by this rule; *viz.* for the first three quarters of an hour 1*s.* for the next quarter 6*d.* and for every 20 minutes after the first hour 6*d.* more; but if the coach is hired for the day, he shall take only 14*s.* 6*d.* for the 12 hours. See further regulations in Burn, tit. *Hackney Coaches*.

Note 37, page 342, line 16, words *land and malt tax*.—Since this was written by the author, that immense sum has been greatly augmented; for Sir John Sinclair (3 *Hist. Rev.* 154.) states, that the produce of the revenue, as it was paid into the exchequer free of all charges in the course of the year from Michaelmas 1787 to Michaelmas 1788, was as follows:

ANNUAL TAXES.			£.
Land-tax	—	—	1,950,000
Malt-tax	—	—	600,000
			2,550,000
PERPETUAL TAXES.			
The customs	—	—	3,789,274
The excise	{ deducting the annual malt-tax as above, }		6,151,727
Stamps	—	—	1,278,214
Miscellaneous taxes or incidents	—	—	1,803,755
Total			15,572,990

The great improvement of this revenue from the year 1783, to the year 1792, will appear by the following statement, taken from an useful and correct publication, entitled "A Brief Examination into the Increase of the Revenue of Great Britain." p. 9:

Produce of all the permanent taxes.			
From 5th January 1783 to 5th January 1784			£.10,194,259
1784	—	1785	10,856,996
1785	—	1786	12,104,798
1786	—	1787	11,867,055
1787	—	1788	12,923,134
1788	—	1789	13,007,642
1789	—	1790	13,433,068
1790	—	1791	14,072,978
1791	—	1792	14,132,000

Note 38, page 344, line 1, words *thirty-six millions*.—

The national debt in 1755, previous to the French war, was	} £. 72,289,000 : Interest 2,654,000
In January, 1776, before the American war, it was	
In 1786, previous to which the whole debt of the last war was not funded, it was	} 123,964,000 : ditto. 4,411,000
	} 239,154,000 : ditto. 9,275,000

Exclusive of a capital of 1,991,000*l.* granted by parliament to the American loyalists; as a compensation for their loss of property.
Brief Exam. 10.

Note 39, page 344, line 3, words *charges of management*.—Sir John Sinclair has calculated the expense of collecting the whole revenue at 1,379,872*l.*; and has stated, that the bounties allowed and paid from the different departments of the revenue in the year 1788, amounted to 536,180*l.* This sum, added to the charges of collection and management, amounts to 1,916,052*l.* And this must be raised from the public by taxation, in addition to the net income paid into the exchequer, which, in the year 1788, he represents to have been 15,572,970*l.*; therefore, in that year, the people of Great Britain paid, in taxes of every description, a gross sum of 17,400,000*l.* 3 Part, 161. And since that time, by the increased commerce and prosperity of the country, this is augmented by considerably more than another million. The number of officers employed in collecting this vast revenue, Sir John Sinclair estimates at 12,500. 3 Part, 157.

In France the revenue officers amount to 250,000. *Id.* 156.

Note 40, page 345, line 3, word *poorer*. It is a very erroneous notion indeed, to suppose that the property of the kingdom is increased by national debts, contracted in consequence of the expenses of war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from its capital forever. The American war cost the nation 116 millions sterling, and the effect is precisely the same as if so much of its wealth and treasure in corn, cattle, cloth, ammunition, coin, &c. had been collected together, and thrown into the sea, besides the loss accruing from the destruction of many of its most productive hands. When this property is consumed, it never can be retrieved, though industry and care may acquire and accumulate new stores. Such a supply, by no mode of taxation that has yet been devised, could be collected at once, without exhausting the patience and endurance of the people. But by the method of funding, the subjects are induced to suppose, that their suffering consists only in the payment of the yearly interest of this immense waste. The ruin is completed before the interest commences, and that is paid by the nation to the nation, and returns back to its former channel and circulation; like the balls in a tennis court, however they may be tossed from one side to the other, their sum and quantity, within the court, continue the same. The extravagance of individuals naturally sug-

gested the system of funding public debts. When a man cannot satisfy the immediate demands of his creditor, it is an obvious expedient to give him a promissory note, to pay him at a future day, with interest for the time; and if this is an assignable note, so that the creditor may be enabled to persuade another to advance him the principal and to stand in his place, it is exactly similar to the debts or securities of government, except that, in general, they are not payable at any definite time. All debts, when no effects remain, both in public and private, are certain evidence of the waste and consumption of so much property, which nothing can restore, though frugality and industry may alleviate the future consequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays interest for it, he is in no degree richer by calling in one hundred pounds from which he receives the same interest, and therewith discharges the debt; but probably if he does so, he will feel himself more comfortable and independent, and will find his credit higher, if his occasions should oblige him to borrow in future. So it is with governments; when the debt is contracted, and the money spent, the mischief is done, the discharge of the debt can add nothing (or little comparatively) immediately to the stock or capital of the nation. But yet these important consequences may be expected from it, viz. from the abolition of taxes upon candles, soap, salt, beer, and upon a melancholy catalogue of the necessary articles of life, taxes which take from those who have nothing to spare, the price of labour would be lowered, manufactures would flourish with renewed vigour, the minds of the people would be cheered, and the nation would again have credit and spirit to meet its most formidable enemies, and to repel and resent both injury and insult. All the nations of Europe have learnt from such dear-bought experience, that poverty and misery are the inevitable consequences of war, as to give us reason to hope, that the lives and property of mankind will not, in future, be dissipated with the profusion and wantonness of former times.

Note 41, page 346, line 8, words *case of necessity*.—The last is certainly a serious and unanswerable objection to the increase of the national debt; but the three first objections made by the learned Judge do not seem to be very satisfactory. It is not clear that it is an evil, that things should grow nominally dear in proportion to the increase of specie, or the medium of commerce; for they will still retain their relative or comparative values with each other. Dr. Adam Smith has ably shewn the benefit which a country derives, from substituting any cheap article for gold and silver. The consequence is, that the precious metals do not become of less value; or if so, it is but in a small degree; but they are carried to a foreign market, and bring back an increase of capital to the country. If one million pounds worth of paper, or shells, would answer as well to settle accounts, go to market, and would serve all the purposes of gold and silver, whilst these preserved their price abroad; and if the coin of this country, at present, amount to 30 millions, we should gain what was equivalent to 29 millions by the substitution.

tion. But the paper security, created by the national debt, is little used in payments, or as a medium of commerce, like bills of exchange.

As to the second objection, foreigners can only take away the interest of money which they have actually brought into the country, and which, it must be presumed, our merchants are deriving as great a benefit from, and probably much greater.

With regard to the third objection, I cannot think it sound discretion ever to raise an invidious distinction between those who pay, and those who receive the taxes, and to treat the latter with contempt. It cannot be supposed that property will ever be accumulated by idleness and indolence; and he surely deserves the best of his country, who, in disposing of the fruits of his industry, prefers the funds to any other security: for without such confidence, the nation would soon be reduced to a state of bankruptcy and ruin.

Note 42, page 347, (last line) words *succeeding years*.—By the 26 Geo. III. c. 31. parliament had the wisdom and firmness to vest unalienably in commissioners, the sum of 1,000,000*l.* annually, for the reduction of the national debt; in which act every possible precaution was taken that could be devised, for preventing this fund from being diverted at any future time, and for carrying to the account of the commissioners for the purposes of the act, the interest of such stock as should be purchased, and such temporary annuities as should fall in.

Under the provisions of this act, eight millions two hundred thousand pounds of the capital of the national debt had been purchased in Feb. 1792; and the amount of the annual sum, then applicable for the reduction of it, was one million three hundred and sixty thousand pounds. *Brief Exam.* 11.

Note 43, page 349, line 25, words *ten millions sterling*.—See notes 37, 38, and 39, to this chapter.

Note 44, page 350, line 16, figures 800,000*l.*—The revenue of the commonwealth was upwards of 1,500,000*l.* (*Sinc. Hist. Rev.* 2 vol. xiv.) This is a striking instance to prove, that the burdens of the people are not necessarily lightened by a change in the government.

CHAPTER THE NINTH.

Of subordinate Magistrates.

Note 1, page 358, line 3, words *to this day*.—The earl of Thanet is hereditary sheriff of Westmoreland. This office may descend to, and be executed by, a female: for "Ann, countess of Pembroke, had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench." *Harg. Co. Litt.* 326.

Note 2, page 358, line 5, words *body by charter*.—The election of the sheriffs of London and Middlesex was granted to the citizens of London for ever in very ancient times, upon condition of their paying 300*l.* a year to the king's exchequer. In consequence of this grant, they have always elected two sheriffs, though these constitute together but one officer; and if one die, the other cannot act till another is elected. (4 *Bac. Abr.* 447.) In the year 1748, the corporation of London made a bye-law, imposing a fine of 600*l.* upon every person, who, being elected, should refuse to serve the office of sheriff. See the case of Evans, Esq. and the chamberlain of London, 2 *Burn. E. L.* 185.

Note 3, page 358, line 26, words 21 *Hen. VIII. c. 20*.—This last statute, as is observed by Mr. Wooddeson, 1 vol. 89. seems quite to a different purpose.

Note 4, page 359, line 15, words *to be sheriff*.—The following is the present mode of nominating sheriffs in the exchequer on the morrow of St. Martin :

The chancellor, chancellor of the exchequer, the judges, and several of the privy council assemble, and an officer of the court administers an oath to them in old French, that they will nominate no one from favour, partiality, or any improper motive: this done, the same officer having the list of the counties, in alphabetical order, and of those who were nominated the year preceding, reads over the three names, and the last of the three he pronounces to be the present sheriff; but where there has been a pocket-sheriff, he reads the three names upon the list, and then declares who is the present sheriff. If any of the ministry or judges has an objection to the names, he then mentions it, and another gentleman is nominated in his room; if no objection is made, some one rises and says, "to the two gentlemen I know no objection, and I recommend A. B. Esq. in the room of the present sheriff."

Another officer has a paper with a number of names given him by the clerk of assize for each county, which paper generally contains the names of the gentlemen upon the former list, and also of gentlemen who are likely to be nominated, and whilst the three are nominated, he prefixes 1, 2, or 3, to their names, according to the order in which they are placed; which, for greater certainty, he afterwards reads over twice. Several objections are made to gentlemen; some, perhaps at their own request; such as, that they are abroad, that their estates are small and incumbered, that they have no equipage, that they are practising barristers, or officers in the militia, &c.

The new sheriff is generally appointed about the end of the following Hilary term; this extension of the time was, probably, in consequence of the 17 Edw. IV. c. 7. which enables the old sheriff to hold his office over Michaelmas and Hilary terms.

Note 5, page 359, line 31, words *substance as follows*.—I am inclined to disagree with the learned Judge's conjecture, that the present practice originated from a statute which cannot now be found; be-

cause if such a statute ever existed, it must have been passed between the date of this record, the 34 Hen. VI. and the statute 23 Hen. VI. c. 8. referred to by the learned Commentator in the preceding page; for that statute recites and ratifies the 14 Edw. III. c. 7. which provides only for the nomination of one person to fill the office when vacant; yet the former statute 9 Edw. II. st. 2. leaves the number indefinite, viz. sheriffs shall be assigned by the chancellor, &c. and if such a statute had passed in the course of those eleven years, it is probable that it would have been referred to by subsequent statutes. I should conceive that the practice originated from the consideration that, as the king was to confirm the nomination by his patent, it was more convenient and respectful to present three to him than only one; and though this proceeding did not exactly correspond with the directions of the statute, yet it was not contrary to its spirit, or in strictness to its letter; and therefore the judges might, perhaps, think themselves warranted in saying, that the three persons were chosen according to the tenor of the statute.

Note 6, page 361, line 2, word *occurred*.—When the king appoints a person sheriff, who is not one of the three nominated in the exchequer, he is called a pocket-sheriff. It is probable, that no compulsory instance of the appointment of a pocket-sheriff ever occurred; and the unanimous opinion of the judges, preserved in the record cited by the learned Commentator from 2 inst. 559. precludes the possibility of such a case. This is an ungracious prerogative; and whenever it is exercised, unless the occasion is manifest, the whole administration of justice throughout one county for a twelve-month, if not corrupted, is certainly suspected. The cause ought to be urgent or inevitable, when recourse is had to this prerogative.

Note 7, page 361, line 17, words *three years after*.—If there be no other sufficient within the county. Until a different regulation was made by 8 Eliz. c. 16. in a great many instances two counties had one and the same sheriff: this is still the case in the counties of Cambridge and Huntingdon.

Note 8, page 364, line 26, words *and his people*.—This is the only qualification required from a sheriff. That it was the intention of our ancestors that the lands of a sheriff should be considerable, abundantly appears from their having this provision so frequently repeated, and at the same time that they obtained a confirmation of *magna charta* and their most valuable liberties. As the sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the country, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In ancient times this office was frequently executed by the nobility and persons of the highest rank in the kingdom. *E igeantur ulim ad hoc officium potentissimi sepe numero totius regni proceres, barones, comites, dukes, interdum et regu filii.* Spel. Gloss. *Viccom.* Bishops also were not unfrequently sheriffs. Richard duke of Gloucester (afterwards Richard the

third) was sheriff of Cumberland five years together. (*Burn. Hist. Camb.* 570.) It does not appear that there is any express law to exclude the nobility from the execution of this office, though it has been long appropriated to commoners.

Note 9, page 364, (last line) word *distemper*.—[By statute 24 Geo. III. sect. 2. c. 54. sect. 22. no gaoler is to suffer tippling or gaming in the prison, or to sell any liquors therein, under the penalty of 10*l.* to be recovered by distress upon conviction.]

Note 10, page 366, line 5, words *only a merchant*.—That this was an office of high dignity in ancient times, appears from Chaucer's description of the Frankelcin :

At sessions ther was he lord and sire,
Ful often time he was knight of the shire,
A shereve hadde he ben, and a coronour,
Was no wher swiche a worthy vavasour.

Selden, tit. hon. 2. c. 5. f. 4. observes, that some copies have it *coronour*; others *countour*. But the office of an accountant is perfectly inconsistent with the character described.

Note 11, page 366, line 6, words *made a knight*.—Which by the *statutum de militibus*, 1 Edw. II. were lands to the amount of 20*l.* *per annum*.

Note 12, page 371, line 34, words *all deductions*.—The 18 Geo. II. c. 20. is the last statute which prescribes the qualifications of justices of the peace. This clear estate of 100*l.* *per annum*, may consist either in freehold or copyhold, an estate of inheritance or for life, or even in a term for 21 years.—A reversion or remainder after one or more lives of the value of 300*l.* *per annum* is also a qualification. But this does not extend to corporation justices, or to the eldest sons of peers, and of gentlemen qualified to be knights of shires, the officers of the board of green cloth, principal officers of the navy, under secretaries of state, heads of colleges, or to the mayors of Cambridge and Oxford, all of whom may act without any qualification by estate.

Note 13, page 372, line 4, words *of the peace*.—For any county.

Note 14, page 372, line 22, words *sheriff or coroner*.—A sheriff cannot act as a justice during the year of his office; but neither the statute referred to, nor I apprehend any other statute disqualifies a coroner from acting as a justice of the peace; nor do the two offices in their nature seem incompatible.

Note 15, page 373, line 5, words *at sessions*.—The sessions cannot be held without the presence of two justices.

Note 16, page 373, line 7, words *one, two*.—Where a statute requires any act to be done by two justices, it is an established rule, that, if the act is of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish ap-

prentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two justices which has yet been construed to be ministerial; and the propriety of this construction has been justly questioned. 4 T. R. p. 380.

Note 17, page 373, line 21, word *amends*.—It behoves every magistrate to be acquainted with the law and the extent of his authority, and he may be compelled to make an adequate compensation to those who suffer by his ignorance or inadvertence: but to protect him from being harassed by vexatious actions, it is provided, that he shall have notice of any action commenced against him, and the cause of it, one month before the writ is sued out, or a copy of it served upon him, by a writing from the attorney of the party, who shall indorse upon it his name and residence. The magistrate may afterwards tender amends, and plead such tender with the general issue and any other plea. And if the sum tendered be thought sufficient by the jury, he shall obtain a verdict with costs. This action must be commenced within six months after the injury complained of. 24 Geo. II. c. 44.

But if a magistrate abuses the authority reposed in him by the law, in order to gratify his malice, or promote his private interests or ambition, he may be punished also criminally by indictment or information. But the court of king's bench have frequently declared, that though a justice of peace should act illegally, yet, if he has acted honestly and candidly, without any bad view or ill intention whatsoever, the court will never punish him, by the extraordinary mode of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. 2 Bur. 1162. And in no case will the court grant an information, unless an application for it is made within the second term after the offence committed, and notice of the application be previously given to the justice, and unless the party injured will undertake to bring no action. And if the party proceeds both by action and indictment, the attorney-general will grant a *noli prosecute* to the indictment. Indeed, where a justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned whether it is an indictable offence; for the act in that case is either null and void, or the justice is answerable in damages for all the consequences of it. It is the object of all punishment to prevent a repetition of the act; and it would be absurd to punish a man for an involuntary act, or for that which he has neither power nor will to avoid.

Note 18, page 373, line 26, word *costs*.—That is, where the judge certifies in court that the injury was wilful and malicious.

Note 19, page 374, line 16, word *horsesback*.—We may form a judgment of his power, and the condition of the people of this country in the fifteenth century, from the following clause in a commission in the 7 Edw. VI. to Richard earl Rivers: *Plenam potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum*

in omnibus et singulis causis et negotiis de et super crimine laesæ majestatis, seu ipsius occasione, cæterisque causis quibuscunque, summarie et de plano, sine strepitu et figura judicii, solâ facti veritate inspectâ. Rym. Foed. tom. xi. p. 582.

Note 20, page 375, line 28, word *ignorance*.—If their powers are dangerous, they ought to be curtailed by the legislature; but surely every officer ought to know the extent of his duty and authority.

Note 21, page 378, line 13, words *thirty feet*.—Two justices, where they think it will render the road more commodious, may order it to be diverted; the power to enlarge does not extend to pull down any building, or to take in the ground of any garden, park, paddock, court, or yard.

No tree or bush shall be permitted to grow in any highway, within fifteen feet from the centre of it, except for ornament or shelter to a house; and the owners of the adjoining lands may be compelled to cut their hedges, so as not to exclude the sun and wind from the highway. Fines awarded by the court for not repairing a highway, shall not be returned into the exchequer, but shall be applied to the repair of the highways as the court shall direct.

But the general highway act, the 13 Geo. III. is far too long to give an adequate representation of it in an abridgment. Those who are interested in it must consult the statute at large; or the title, *Highway*, in Burn's Justice, where it is fully stated.

Note 22, page 378, line 35, words *well disposed christians*.—The poor in Ireland, to this day, have no relief but from private charity. 2 *Ld. Mountm.* 118.

Note 23, page 380, line 4, words *of the justices*.—It is declared by the statute, that the church-wardens of every parish shall be overseers of the poor; besides these, the justices may appoint two, three, or four, but not more, of the inhabitants overseers for each parish. (1 *Burr.* 446.) But if a parish is divided into townships, and is so large, that some townships cannot reap the benefit intended by the 43 of Elizabeth, in that case, separate overseers may be appointed for such townships, under the 13 & 14 Car. II. c. 12. Wherever there is a constable, there is a township. 1 *T. R.* 374.

A woman may be appointed an overseer of the poor, if a substantial householder. 2 *T. R.* 395.

Note 24, page 382, line 13, words *can be bad*.—By 13 & 14 Car. II. c. 12. all persons who are likely to become chargeable, unless they rent a tenement of the yearly value of 10*l.* may be removed to the places where they are legally settled. This statute was certainly a great infringement of *magna charta* and the liberty of the subject; as nothing can be more cruel or impolitic, than to prevent a person from residing in that situation where, by his industry and occupation, he can best procure a competent provision for himself and his family. To alleviate, in some degree, the hardship and inconvenience introduced by that statute, the legislature has provided by the 8 & 9 W. III. c. 30. that if the major part of the overseers of any parish or township will grant a certificate under their hands

and seals, attested by two witnesses, and allowed and subscribed by two justices, acknowledging a person and his family therein specified, to have a legal settlement in their parish or township, such person may afterwards go into any parish; and, having delivered this certificate to the parish officers, neither he nor his family are removable from thence till they are actually chargeable. But as the object of the certificate was to prevent him from bringing any incumbrance upon the parish where he is thus permitted to reside, by the 9 & 10 W. III. c. 11. he is restrained from gaining a settlement where he lives under the protection of the certificate by any means whatever, except by renting a tenement of the yearly value of 10*l*. and by a residence in the parish for forty days, or by executing an annual office. But besides these two cases mentioned in the act, it has been held, that a certificate person may gain a settlement by residing upon (or having in the parish where he resides) any estate whatever of his own, provided, if it has been actually purchased by him, he has *bonâ fide* paid 30*l*. for it. *Str.* 163. 1193. *Burr. S. C.* 220. A certificate is conclusive upon the parish granting it, with respect to the parish to which it is granted or first delivered; but it is not so with regard to other parishes; for though it will be *prima facie* evidence against the parish granting it, yet it may be repelled by other evidence; and they may be permitted to shew, that they gave it under a mistake, and in their own wrong. 4 *T. R.* 251.

A certificate extends to children born after it is granted, but not to the grandchildren of the *pater-familias*. 4 *T. R.* 797.

Note 25, page 382, line 28, words *for themselves*.—If the parents acquire a new settlement, the children also follow, and belong to the last settlement of the father, or after the death of the father, to the last settlement of the mother, till they are emancipated or become independent of their father's or mother's family, and in that case they have that settlement which their parent had at the time of emancipation.

This is a very indefinite word, and it is no wonder that several cases have arisen upon the interpretation of it. Lord Kenyon seems to have given as full and as just an explication of it, as it will admit, in observing, that "the cases of emancipation have always been decided on the circumstances either of the son's being twenty-one, or married, or having contracted a relation, which was inconsistent with the idea of his being in a subordinate situation in his father's family." 3 *T. R.* 356.

Note 26, page 383, line 2; words *old settlement*.—In the absence or after the death of the husband, in that case the wife and her children may be removed to her maiden settlement; but it seems fully determined that they cannot be separated or removed from the husband. (*Burr. S. C.* 813. 1 *Str.* 544.) The consequence is, that the whole family must be supported as casual poor, in the parish where they may happen to want relief. In the removal of a wife or a widow, it is sufficient in the first instance to prove her maiden settlement. *Cald.* 39. 236.

Note 27, page 383, line 19, words *remove him*.—I apprehend this notice is never given. It will not be given by a person not likely to become chargeable; and a person likely to become chargeable would be sure to be removed.

Note 28, page 383, line 20, words *a year*.—It is not necessary that the renting should be for a year; if a tenement of the yearly value of 10*l.* be taken for two months, or 40 days only, it will be sufficient to give a settlement. (*Bur. S. C.* 474.) Nor is it necessary there should be any house upon the premises, even a renting of the after-grass or pasturage will be sufficient. (4 *T. R.* 348.) A person gains a settlement by residing in the parish in which part of the premises lies, but not by residing elsewhere. (2 *T. R.* 48.) It need not be one entire tenement; for if he takes one tenement in one parish, and another in a different parish, if together they are of the value of 10*l.* a year, he will gain a settlement by residing in either parish; the value only is material: it will be sufficient to give a settlement, if the enjoyment of the tenement is gratuitous, or if no rent is to be paid for it. 1 *T. R.* 458.

Note 29, page 383, line 32, words *and childless*.—A widower or widow with children emancipated is considered as childless, for such children cannot follow the settlement gained by their parent's service. 3 *Burn.* 445. If an unmarried man is hired for a year, but, before he enters upon the service, or during the service, marries, he may gain a settlement. 3 *T. R.* 382. But this will not extend to the continuance in the service, a second year; for he was married when this new contract was expressly or impliedly entered into. *Cald.* 54. Hiring for any time certainly less than a year will not be sufficient; but from Whitsuntide to Whitsuntide is considered a year, though it will frequently happen to be a period less than 365 days. To gain a settlement as a servant there must be a hiring for a year, and a continued service for a year; but it is not necessary that the service should be subsequent to the hiring; for if there is a continued service for eleven months or any other part of a year, by any number or modes of hiring, or with any difference of wages, and afterwards a hiring for a year and a service to complete the year, a settlement is gained. *Cald.* 179. There seemed to be great reason to think that the service subsequent to the hiring for a year should, at least be 40 days; but it is now decided that that is not necessary. (5 *T. R.* 98.) The settlement of a servant and an apprentice is where the last reside 40 days in their master's employ; and where they do not reside 40 days successively at one place, but alternately in two or more parishes, and more than 40 days upon the whole in each in the course of a year, the settlement is in that parish in which they sleep the last night. *Doug.* 633.

Note 30, page 384, line 29, words *above mentioned*.—See note (24) of this chapter.

Note 31, page 385, line 2, words *great variety*.—For a full and complete knowledge of this extensive subject, recourse must be had to Burn's Justice, and Mr. Confi's valuable edition of Bott, and the reporters there referred to.

CHAPTER THE TENTH

Of the People, whether Aliens, Denizens, or Natives.

Note 1, page 390, line 23, words *natural prince*.—Sir Michael Foster observes, that “the well known maxim, which the writers upon our law have adopted and applied to this case, *nemo potest exuere patriam*, comprehendeth the whole doctrine of natural allegiance.” *Foss.* 184. And this is exemplified by a strong instance in the report which that learned judge has given of *Æneas Macdonald's* case. He was a native of Great Britain, but had received his education from his early infancy in France, had spent riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king; acting under that commission, he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Ib.* 59.

This is certainly an extreme case; and we should have reason to think our law deficient in justice and humanity if we could discover any intermediate general limit, to which the law could be relaxed consistently with sound policy or the public safety.

Note 2, page 390, line 28, words *kingdom to another*.—Mr. J. Foster informs us, that it was laid down in a meeting of all the judges, that “if an alien, seeking the protection of the crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the king's enemies for purposes of hostility, he may be dealt with as a traitor.” *Foss.* 185.

Note 3, page 392, line 15, words *entitled to them*.—A woman alien cannot be endowed, unless she marries by the license of the king; and then she shall be endowed by 8 Hen. V. No. 15, *Rot. Parl. Harg. Co. Litt.* 31. a. n. 9. Neither can a husband alien be tenant by the curtesy. 7 Co. 25.

Note 4, page 392, line 32, words *his habitation*.—But a lease of lands will be forfeited to the king. *Co. Litt.* 2.

Note 5, page 393, line 4, words 5 *Eliz. c. 7*.—Mr. Hargrave says, the statute 32 Hen. VIII. c. 16, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed. *Co. Litt.* 2. n. 7. See also 1 *Wood.* 373.

Note 6, page 393, line 14, words *time of war*.—Until all ransoms of captured ships and property were prohibited by 22 Geo. III. c. 25. an alien enemy could sue in our courts upon a ransom bill. Lord Mansfield in a case of that kind declared, that “it was sound policy, as well as good morality, to keep faith with an enemy in time of war. This is a contract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice.” *Doug.* 625.

Note 7, page 394, line 13, words *Great Britain*.—All these exceptions to the common law, introduced by the legislature, are in

cases where the father or grandfather is a natural-born subject ; but there is no provision made for the children born abroad of a mother, a natural-born subject, married to an alien. And in a late case, in which it was stated that the mother of the plaintiff was an English woman, who married a subject of France, and had a son born to him in France, it was decided that that son could not inherit his mother's lands in England. *Count Durore v. Jones*, 4 T. R. 300.

Note 8, page 394, line 20, words *natural-born subjects*.—Unless the alien parents are acting in the realm as enemies ; for my lord Coke says, it is not *calum nec solum*, but their being born within the allegiance, and under the protection of the king, 7 Co. 18. a.

Note 9, page 394, line 23, words *it is an alien*.—The present learned Vinerian professor informs us, that “ in this respect there is not any difference between our laws and those of France. In each country birth confers the right of naturalization.” 1 Woodd. 386.

Note 10, page 394, line 43, words *none to the son*.—By the 11 & 12 W. III. c. 6. natural born subjects may derive a title by descent through their parents or ancestor, though they are aliens. But by 25 Geo. II. c. 39. this restriction is superadded, viz. that no natural-born subject shall derive a title through an alien parent or ancestor, unless he be born at the time of the death of the ancestor who dies seized of the estate which he claims by descent, with this exception, that if a descent shall be cast upon a daughter of an alien, it shall be divested in favour of an after-born son ; and in case of an after-born daughter or daughters only, all the sisters shall be coparceners. This exception, as it should seem, would have been quite superfluous, if lord Coke had not held that a son of an alien could not inherit from his brother, though the contrary had been since determined. *Harg. Co. Litt.* 8. a.

Note 11, page 395, line 13, words *grants, &c.*—This statute 12 W. III. c. 2. was passed from a jealousy of king William's partiality to foreigners.

CHAPTER THE ELEVENTH:

Of the Clergy.

Note 1, page 398, line 6, word *fuils*.—That is for a reasonable time, *cundo, redundo, et morando*, to perform divine service. 12 Co. 100.

Note 2, page 398, line 8, word *once*.—This is a peculiar privilege of the clergy, that sentence of death can never be passed upon them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences ; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death upon a second conviction of a clergyable offence ; for if a layman has once been convicted of manslaughter, upon production of the conviction he may afterwards suffer death for bigamy, or any other felony, within clergy, or which would not be a capital crime to another person.

not so circumstanced. But for the honour of the clergy, there are few or no instances in which they have had occasion to claim the benefit of this privilege. Sec. 4 vol. c. 28.

Note 3, page 398, line 13, word *commons*.—See the Editor's reasons for the capacity of the clergy to sit in the house of commons in note 37 to Ch. II.

Note 4, page 398, line 16, words of *the lease*.—But if they have not sufficient glebe, they may take a farm for the necessary expenses and consumption of their households. 21 Hen. VIII. c. 13. s. 8.

Note 5, page 398, line 17, word *brewhouse*.—One sees some reason why a poor clergyman should be tempted to sell ale; but the singular prohibition to keep a tanhouse probably originated from a practice peculiar to the time.

Note 6, page 398, line 19, words *treble value*.—Though a clergyman is subject to this penalty for trading, yet his contracts are valid, and he is liable to be made a bankrupt. Cooke, Bankr. 33.

Note 7, page 401, line 5, word *crowns*.—This statute was afterwards repealed by 1 Edw. VI. c. 2. which enacted that all bishopricks should be donative as formerly. It states in the preamble that these elections are in very deed no elections but only by a writ of *conge d'elire* have colours, shadows, or pretences of election. 1 Burn, Ec. L. 183. This is certainly good sense. For the permission to elect where there is no power to reject can hardly be reconciled with the freedom of election. But this statute was afterwards repealed by 1 Ma. II. c. 20. and other statutes. 12 Co. 7. But the bishopricks of the new foundation were always donative. Harg. Co. Litt. 134. As also are all the Irish bishopricks by the 2 Eliz. c. 4. Irish Statutes.

Note 8, page 401, line 24, words *king's hands only*.—It is a prevailing vulgar error, that, when a bishop has an offer made of a bishoprick, he affects a maiden coyness and answers *nolo episcopari*. The origin of these words and this notion I have not been able to discover; the bishops certainly give no such refusal at present, and I am inclined to think they never did at any time in this country.

Note 9, page 401, line 23, word *præmunire*.—It is directed in the form of consecrating bishops, confirmed by various statutes since the reformation, that a bishop when consecrated must be full thirty years of age. There seems to have been no restriction of this kind in ancient times; for bishop Goodwin informs us, that George Nevile, the brother of the earl of Warwick, the king maker, was chancellor of Oxford, *et in episcopum Exoniensem consecratus est anno 1155, nondum annos natus viginti. Anno deinde 1460 (id quod jure mirare) summus Angliæ factus est cancellarius.* A few years afterwards he was translated to the archbishoprick of York. *Hoc sedente episcopus Sancti Andrea in Scotia, archiepiscopus per Sixtum quartum creatus est, jussu illi duodecim episcopis illius gentis subesse, qui hætenus archiepiscopi Eboracensis suffraganei censebantur. Reclamante quidem, Eboracensi, sed frustra; assente pontifice, minime convenire, ut ille Scotia sit metropolita-*

nus, qui propter crebra inter Scotos ac Anglos bella, Scotis plerumque hostis sit capitalis. Godw. Comm. de Præsul 693.

Note 10, page 401, line 32, words *notorious cause*.—In the 11 W. III. the bishop of St. David's was deprived for simony, and other offences, in a court held at Lambeth before the archbishop, who called to his assistance six other bishops. The bishop of St. David's appealed to the delegates, who affirmed the sentence of the archbishop; and after several fruitless applications to the court of king's bench and the house of lords, he was at last obliged to submit to the judgment. *Lord Ray. 541. 1 Burn. Ec. L. 212.*

Note 11, page 402, line 22, word *successors*.—The consequence is, that the archbishop never can have more than one option at once from the same diocese. These options become the private patronage of the archbishop, and upon his death are transmitted to his personal representatives; or the archbishop may direct by his will, whom, upon a vacancy, his executor shall present; which direction, according to a decision in the house of lords, his executor is compellable to observe. *1 Burn. Ec. L. 226.* If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; so likewise if a bishop dies after an option becomes vacant, and before the archbishop or his representatives has presented, and the clerk is instituted, the crown *pro hac vice* will be entitled to present to that dignity or benefice. *Amb. 101.* For the grant of the option by the bishop to the archbishop has no efficacy beyond the life of the bishop.

Note 12, page 403, line 4, words *this kingdom*.—It is said that the archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain. *1 Burn. Ec. L. 178.*

Note 13, page 403, line 10, words *the like*.—When the dominion of the pope was overturned in this country, this prerogative of dispensing with the canons of the church was transferred by that statute to the archbishop of Canterbury in all cases in which dispensations were accustomed to be obtained at Rome; but in cases unaccustomed, the matter shall be referred to the king and council. The pope could have dispensed with every ecclesiastical canon and ordinance. But in some of the cases where the archbishop alone has authority to dispense, his dispensation with the canon, as to hold two livings, must be confirmed under the great seal.

Note 14, page 403, line 11, word *degrees*.—But although the archbishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree: as, for instance, those degrees which are a qualification for a dispensation to hold two livings, are confined by 21 Hen. VIII. c. 13. f. 23. to the two universities.

Note 15, page 403, line 32, words *king himself*.—The following are some of the popular distinctions between archbishops and bishops. The archbishops have the titles and style of *grace*, and *most rever-*

and father in God by divine providence; the bishops those of lord, and right reverend father in God by divine permission. Archbishops are enthroned, inthronizati; bishops installed.

Note 16, page 404, line 9, words *as bishops*.—See a very learned note, containing a full history of the election, presentation, or donation to deaneries, by Mr. Hargrave in Co. Litt. 95.

Note 17, page 404, line 11, words *dissolved monasteries*.—The new deaneries and chapters to old bishopricks are eight, viz. Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle; and five new bishopricks with new deaneries and chapters annexed were created, viz. Peterborough, Chester, Gloucester, Bristol, and Oxford. *Harg. Co. Litt. 95. n. 3.*

Note 18, page 404, line 18, words *their ordinary*.—The bishop is generally called the ordinary, but *the ordinary* has a more extensive signification, as it includes every ecclesiastical judge who has the regular *ordinary* jurisdiction independent of another. 1 *Burn. Ec. L. 22. Co. Litt. 344.*

Note 19, page 407, line 20, words *clerk so presented*.—The Editor conceives that there is no authority or reason to suppose, that the appropriator can thus create a sinecure rector. But if the appropriator or impropiator should, either by design or mistake, present his clerk to the parsonage, it is held, that the vicarage will ever afterwards be dissolved, and the incumbent will be entitled to all the tithes and dues of the church as rector. *Wats. c. 17. 2 R. 16. 338.*

Note 20, page 407, line 21, word *sinecure*.—Wherever a rector and vicar are presented and instituted to the same benefice, the rector is excused all duty, and has what is properly called a sinecure. But where there is only one incumbent, the benefice is not in law a sinecure, though there should be neither a church nor any inhabitants within the parish.

Note 21, page 407, line 29, words *at this day*.—It surely may be questioned whether such a power any longer exists; it cannot be supposed that, at this day, the inhabitants of a parish, who had been accustomed to pay their tithes to their officiating minister, could be compelled to transfer them to an ecclesiastical corporation, to which they might perhaps be perfect strangers. Appropriations are said to have originated from an opinion inculcated by the monks, that tithes and oblations, though payable to some church, yet were an arbitrary disposition of the donor, who might give them, as the reward of religious service done to him, to any person whatever from whom he received that service. 1 *Burn. Ec. L. 63.* And till they had got complete possession of the revenues of the church, they spared no pains to recommend themselves as the most deserving objects of the gratitude and benefaction of the parish. There probably have been no new appropriations since the dissolution of monasteries.

Note 22, page 409, line 16, words *keep hospitality*.—From this act we may date the origin of the present vicarages; for before this

time the vicar was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the regular clergy; for the monks who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradistinction to the parochial clergy, who performed their ministry in the world *in seculo*, and who from thence were called secular clergy. All the tithes or dues of the church of common right belong to the rector, or to the appropriator or impropiator, who have the same rights as the rector; and the vicar is entitled only to that portion which is expressed in his endowment, or what his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment. And where there is an endowment he may recover all that is contained in it; and he may still retain what he and his predecessors have enjoyed by prescription though not expressed in it; for such a prescription amounts to evidence of another consistent endowment. These endowments frequently invest the vicar with some part of the great tithes; therefore the words rectorial and vicarial tithes have no definite signification. But great and small tithes are technical terms, and which are, or ought to be, accurately defined and distinguished by the law.

Note 23, page 409, line 33, words *standing salary*.—A vicar, from what has been advanced in the preceding page and note, must necessarily have an appropriator over him, or a sinecure rector, who in some books is considered and called an appropriator. Of benefices, some have never been appropriated; consequently in those there can be no vicar, and the incumbent is rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except, perhaps, some few which may have been dissolved; others were appropriated to the houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the crown; and in the hands of the king or his grantees are now called impropriations; but in some appropriated churches no perpetual vicar has ever been endowed; in that case the officiating minister is appointed by the appropriator or impropiator, and is called a perpetual curate.

Note 24, page 410, line 17, words *ordained a priest*.—By canon 34, no one shall be admitted to the order of a deacon till he be twenty-three years old; and by that canon, and also by 13 Eliz. c. 12. no one can take the order of a priest till he be full four and twenty years old. 3 Burn. Ec. L. 27.

Note 25, page 411, line 1, words *be a bishop*.—Though this be classed in the books among the causes of refusal, yet such is the liberality of the present times, that no one need apprehend that his preferment would be impeded by the incontinence of his parents, or by any demerit but his own.

Note 26, page 412, line 15, words *by the bishop*.—It does not appear that the List of can dispense with the vicar's oath, which is

that he will be resident upon his vicarage; unless dispensed withal, by his diocesan. 1 *Burn. Ec. L.* 148.

Note 27, page 413, line 28, word *wilfully*.—Ill health, or any inevitable abience; is an exemption from the penalties of this statute. *Gibf. Cod.* 887.

Note 28, page 413, last line, word *same*.—This statute must be put in suit by a common informer within a year, or by the king within two years, so that 12 penalties, or 12*ol.* may be recovered at once by a subject for himself and the king, or the king may recover at once 25 penalties, or 25*ol.* (See 4 vol. 308.) But, independent of this statute, the bishop in his court may compel the residence of all clergy, who have the cure or care of souls within his diocese. 3 *Burn. Ec.* 281. *Gibf.* 887. This statute is not confined to parsonages and vicarages, but extends to all archdeaconries, deanries, and dignities in cathedral and collegiate churches. Those who have two benefices or dignities, upon each of which residence is required, must reside upon one or the other. But it has lately been decided, that the incumbent of an augmented curacy cannot be prosecuted under the statute for the penalties of non-residence. 4 *T. R.* 665.

Note 29, page 414, line 2, words *retain them*.—The king can give a license to his chaplains for non-residence, even whilst they do not attend his household; but the chaplains of noblemen are only excused during their actual attendance upon their lords or ladies. 3 *Burn. Ec. L.* 290.

Note 30, page 414, line 3, word *magistrates*.—Viz. the chancellor, vice-chancellor, commissary, doctors of the chair, (*i. e.* doctors who used to preside in the public schools,) and readers of lectures; and under this description only, can professors claim an exemption from residence.

Note 31, page 414, line 13, words *neighbouring parish*.—It has been decided, by the court of king's bench, that even where there is no parsonage house, the incumbent is bound to reside within the parish. *Corop.* 429. If a clergyman had one benefice with a parsonage-house, and another benefice without a house, the Editor conceives that he is not bound to reside in that parish in which there is a house, for more important duties may impel him to reside within the parish where there is no house; and that such residence would exempt him from the penalties of the statute. But where the archdeacon of St. Alban's had the living of Bushey within his archdeaconry, to which living there is a parsonage-house belonging, and he resided in the parish of Bushey, but not in the parsonage-house; it was held by the court of king's bench, that he was subject to the penalties of non-residence, though he was living within the limits of his archdeaconry, to which dignity there is no house appurtenant. 5 *Burr.* 2722. If then the Editor's opinion be well founded, the decision must have been different, if he had resided in any other part of his archdeaconry out of the parish of Bushey.

Note 32, page 414, line 19, word *benefices*.—This act enables the incumbent, when there is no parsonage-house, or where it is so ruinous as not to be repaired with one year's income of the living, to borrow, with the consent of the patron and ordinary, upon mortgage of the revenue of the living, a sum not exceeding two years clear value, to be laid out in repairs, building, or the purchase of a house. The interest of the money borrowed, is to be repaid by the incumbent yearly, and 5 *per cent.* of the original sum; or 10*l. per cent.* if he does not reside twenty weeks within a year. And where the income is 100*l.* a year, and the incumbent does not reside twenty weeks within a year, the patron and the ordinary are empowered to undertake this without his consent. The governors of queen Anne's bounty may lend money upon such mortgages, at 4*l. per cent.* interest; and 100*l.* upon a living under 40*l.* a year, without any interest. Colleges and other corporations may lend money for this purpose upon their own livings, without interest. For forms and mode of proceeding, consult the statute at large. It is very remarkable that, under this act, the money borrowed was directed to be discharged by paying 5*l. per cent.* yearly, upon the principal remaining due; the consequence was, that it would have been diminished by decreasing installments, which would have produced an infinite series, or the whole could never have been paid. And it required another act, the 21 Geo. III. c. 66. which was passed merely for the purpose, to correct this palpable blunder, by which statute, the original sum must be paid, as stated, at the farthest, within twenty years.

Note 33, page 414, line 27, word *dispensation*.—But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurer-ships, chanter-ships, prebends, and sinecure rectories; a dispensation in this case can only be granted to hold one benefice more, except to clerks, who are of the privy-council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice without a dispensation; and in that case, if the first is under 8*l. per annum*, it is so far void that the patron may present another clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. But, independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l. per annum*, except the last, and then, by a dispensation under the statute, he may hold one more.

by the 41st canon of 1603, the two benefices must not be farther distant from each other than 30 miles, and the person obtaining the dispensation, must at least be a master of arts in one of the universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Black. Rep.* 968. See note 14, p. 83.

Note 34, page 414, line 28, word *chaplains*.—The number of the chaplains of the king and royal family, who may have dispensations, is unlimited. An archbishop may have eight, a duke and bishop six, a marquis and earl five, a viscount four. The chancellor, a

baron, and knight of the garter, three ; a dutchess, marchioness, countess, and baroness, being widows, two. The king's treasurer, comptroller, secretary, dean of the chapel, amver, and the master of the rolls, two. The chief justice of king's bench, and warden of cinque ports, one. These chaplains only can obtain a dispensation under the statute.

If one person has two or more of these titles or characters united in himself, he can only retain the number of chaplains limited to his highest degree ; and if a nobleman retains his full number of chaplains, no one of them can be discharged, so that another shall be appointed in his room during his life. 4 Co. 90. The king may present his own chaplains, i. e. waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation ;—but a king's chaplain being beneficed by the king, cannot afterwards take a living from a subject, but by a dispensation according to the statute. S. 29. 1 Salk. 168.

Note 35, page 412, (last line) words *lords and knights*.—This privilege is not enjoyed by the brother and son of a baronet, for the rank of baronet did not then exist.

Note 36, page 415, line 1, words *divinity and law*.—The words of the statute are, "all doctors and bachelors of divinity, doctors of law, and bachelors of the law canon." Before the reformation, degrees were as frequent in the canon law as in the civil law. Many were graduates *in utroque jure*, or *utriusque juris*. J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But Hen. VIII. in the 27th year of his reign, when he had renounced the authority of the pope, issued a mandate to the university of Cambridge, *ut nullus legatur palam et publice lectio in jure canonico sine pontificio, nec aliquis cujuscunque conditionis homo gradum aliquem in studio illius juris pontificii suscipiat, aut in eodem in posterum promoveatur quovis modo*. Stat. Acad. Cant. p. 137. It is probable, that, at the same time, Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England.

Note 37, page 415, line 3, word *cession*.—In the case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases ; but there is great reason to think, that lapse will not incur from the time of institution against the patron, unless notice be given him ; but lapse will incur from the time of induction without notice. 2 Will. 200. 3 Burr. 1504.

Note 38, page 415, line 13, words *commenda retinere*.—These commendams are now seldom or never granted to any but bishops ; and in that case, the bishop is made commendatory of the benefice, while he continues bishop of such a diocese, as the object is to make it an addition to a small bishoprick : and it would be unreasonable to grant it to a bishop for his life, who might be translated afterwards to one of the richest sees. See an account of the proceedings in the great case of commendams, Hob. 140. and Collier's Eccl. Hist. 2 vol. p. 710.

Note 39, page 415, line 20, words *must be made*.—It seems to be clear, that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the bishop of London and Fytche, the judges in general declined to answer whether a bishop was compellable to accept a resignation: one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland till he has resigned all his benefices in England. But lord Thurlow seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. See 3 *Burn*. 304. and the opinions of the judges in *Cunningham's Case of Simony*, though ill reported.

Note 40, page 416, line 26, word *benefice*.—It was provided in 1603, by canon 33, that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a college, or a master of arts of 5 years standing, who lives in the university at his own expense, he shall support him till he shall prefer him to a living. 3 *Burn. Ec. L.* 28. And the bishops, before they confer orders, require either proof of such a title as is described by the canon, or a certificate from some rector or vicar, promising to employ the candidate for orders *bona fide* as a curate, and to grant him a certain allowance, till he obtains some ecclesiastical preferment, or shall be removed for some fault. And in a case where the rector of St. Ann's, Westminster, gave such a title, and afterwards dismissed his curate without assigning any cause, the curate recovered, in an action of assumpsit, the same salary for the time after his dismissal which he had received before. *Coop.* 457. And when the rector had vacated St. Ann's, by accepting the living of Rochdale, the curate brought another action to recover his salary since the rector left St. Ann's; but lord Mansfield and the court held, that that action could not be maintained, and that these titles are only binding upon those who give them, while they continue incumbents in the church for which such curate is appointed. *Doug.* 137.

No curate or minister ought to perform the duties of any church before he has obtained a license from the bishop. 2 *Burn.* 58.

The bishop cannot increase the salary of the curate, where there is a specific agreement between the incumbent and the curate. *Freem.* 70.

CHAPTER THE TWELFTH

Of the Civil State.

Note 1, page 420, line 18, words *royal dignity*.—This reason is not very satisfactory, and, in fact, this order of nobility was created

before Edward assumed the title of king of France. Dr. Henry, in his Excellent History of England, informs us, that "about a year before Edward III. assumed the title of king of France, he introduced a new order of nobility, to inflame the military ardour and ambition of his earls and barons by creating his eldest son prince Edward duke of Cornwall. This was done with great solemnity in full parliament at Westminster, March 17, A. D. 1337." *Hen. Hist.* 8 vol. 135. 8vo. edition. See *ante*, p. 231, note 10.

Note 2, page 422, line 3, word *viscount*.—These Latin and French words are the same as sheriff in English. This proves the high respect, that was shewn to this officer in ancient times, for his name alone was thought an honourable title of nobility. See note 8. p. 364.

Note 3, page 422, line 11, word *titles*.—At the time of the conquest, the temporal nobility consisted only of earls and barons; and by whatever right the earls and the mitred clergy before that time might have attended the great council of the nation, it abundantly appears that they afterwards sat in the feudal parliament in the character of barons. It has been truly said, that for some time after the conquest, wealth was the only nobility, as there was little personal property at that time, and a right to a seat in parliament was entirely territorial, or depended upon the tenure of landed property. Ever since the conquest, it has been true, that all land is held either immediately or mediately of the king; that is, either of the king himself, or of a tenant of the king, or it might be after two or more subinfeudations. And it was also a general principle in the feudal system, that every tenant of land, or land-owner, had both a right and obligation to attend the court of his immediate superior. Hence every tenant *in capite*, i. e. the tenant of the king, was at the same time entitled and bound to attend the king's court of parliament, being the great court baron of the nation.

It will not be necessary for me here to enlarge farther upon the original principles of the feudal system, and upon the origin of peerage; but I shall briefly abridge the account which Selden has given in the second part of his *Titles of Honour*, c. 5. beginning at the 17th section, being perhaps the clearest and most satisfactory that can be found. He divides the time from the conquest into three periods:—1. From the conquest to the latter end of the reign of king John. 2. From that time to the 11th of Richard II. 3. From that period to the time he is writing, which may now be extended to the present time. In the first period, all, who held any quantity of land of the king, had, without distinction, a right to be summoned to parliament; and this right being confined solely to the king's tenants, of consequence all the peers of parliament during that period sat by virtue of tenure and a writ of summons.

In the beginning of the second period, that is, in the last year of the reign of king John, a distinction, very important in its consequences, (for it eventually produced the lower house of parliament,) was introduced; viz. a division of these tenants into greater and

lesser barons : for king John in his *magna carta* declares, *faciemus summoneri, archiepiscopos, episcopos, abbates, comites, et majores barones regni sigillatim per literas nostras, et praterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes alios, qui in capite tenent de nobis ad certum diem, &c.* See Bl. Mag. Ch. Joh. p. 14. It does not appear that it ever was ascertained what constituted a greater baron, and it probably was left to the king's discretion to determine; and no great inconvenience could have resulted from its remaining indefinite, for those who had not the honour of the king's letter, would have what in effect was equivalent, a general summons from the sheriff. But in this second period tenure began to be disregarded, and persons were summoned to the parliament by writ, who held no lands of the king. This continued to be the case till the 11th of Rich. II. when the practice of creating peers by letters patent first commenced.

In that year John de Beauchamp, steward of the household to Rich. II. was created by patent lord Beauchamp baron of Kidderminster in tail male; and since that time peerages have been created both by writ and patent, without any regard to tenure or estate.

Note 4, page 422, line 27, word *countenance*.—Lords of manors, who had granted to others by subinfeudation part of that estate which they held of the king, would necessarily be barons; but it does not follow conversely that a baron was of necessity a lord of a manor: for the king's tenant, who retained all the estate granted him, and alienated no part of it, would certainly be as complete a baron as a lord of a manor.

Note 5, page 424, line 15, word *grandfather*.—And where the father's barony is limited by patent to him and the heirs male of his body, and his eldest son is called up to the house of lords by writ with the title of this barony, the writ, in this case will not create a fee of a general estate tail, so as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the same. Case of the claim to the barony of Sidney of Penshurst disallowed. *Dom. Proc.* 17 June, 1782.

Note 6, page 424, line 19, words *in the writ*.—Though this is the authority of lord Coke, it is now understood to be erroneous; a creation by writ does not confer a fee simple in the title, but only an estate tail general; for every claimant of the title must be descended from the person first ennobled. 1 *Wood.* 37.

Note 7, page 424, line 32, words *tried by his peers*.—A nobleman is tried by his peers only in treason and felony, and misprision of the same; but in all misdemeanors, as libels, riots, perjury, conspiracies, &c. he is tried like a commoner by a jury. 3 *Inst.* 30. 2 *Howt.* 424.

Note 8, page 425, line 6, words *ennobled in blood*.—It has always appeared to me that the reason given in the books, why bishops should not be tried in parliament like the temporal lords, *viz.* because they are not ennobled by blood, or as Selden expresses it,

because their honour is not inheritable (*Jud. in Parl. c. 1.*) is unsatisfactory and even trifling.

If this reason has any operation, why should it not be extended, and deprive them of all the rights of peerage? A peer may be created by patent for his own life only; and it cannot be supposed that such a nobleman would not be entitled to a trial by his peers in parliament. If there were any trials of bishops by a jury in remote times, the bishops could not have demanded a trial in parliament without admitting themselves subject to a temporal jurisdiction from which the clergy in ancient times claimed a total exemption. Hence it may be conjectured the bishops have lost their right to be tried in parliament, though only two instances can be found of their being tried by a jury; viz. those of archbishop Cranmer and bishop Fisher. 2 *Hawt.* 596.

Note 9, page 425, line 18, words *she still remains noble*.—But she communicates no rank or title to her husband. *Harg. Co. Litt.* 326. & There have been claims, and these are supported by authorities, by a husband after issue to assume the title of his wife's dignity, and after her death to retain the same as tenant by the courtesy; but from Mr. Hargrave's statement of this subject, in *Co. Litt.* 29. b. n. 1. there is no probability that such a claim would now be allowed.

Note 10, page 425, line 21, words *it is also lost*.—Yet she is commonly called and addressed by the title and title, which she bore before her second marriage, but this is only by courtesy; as the daughters of dukes, marquises, and earls are usually addressed by the title of lady, though in law they are commoners. In a writ of partition brought by Ralph Haward, and lady Ann Powes his wife, the court held that it was a misnomer, and that it ought to have been by Ralph Haward and Ann his wife, late wife of lord Powes deceased. *Dyer*, 79.

Note 11, page 425, line 33, words *must be sworn*.—If he is examined as a witness in the high court of parliament, he must be sworn. The bishop of Oxford was sworn in the impeachment of lord Macclesfield and lord Mansfield, (then lord Stormont) in that of Mr. Hastings. *2 R. 2. c. 1.*

Note 12, page 427, line 27, words *Ulster in Ireland*.—One hundred gentlemen advanced each one thousand pounds; for which this title was conferred upon them. 2 *R. 2.* 185 *fn.*

Note 13, page 427, line 29, words *family coat*.—The arms of Ulster are, a hand gules, or a bloody hand in a field argent.

Note 14, page 427, line 33, words *knights, bachelors*.—The most probable derivation of the word bachelor is from *bis* and *chapel*, an inferior knight; and thence latinized into the barbarous word *baccalaureus*. *Ducange. Bar.*

The lowest graduates in the universities are styled *bachelors*, and were, till lately, addressed with *sr* before their surname; as in Latin they are still called *domini*. It is somewhat remarkable, that whilst this feudal word has long been appropriated to single men,

another feudal term of higher dignity, viz. baron, should in legal language, be applied to those who are married.

Note 15, page 428, line 14, words *from an horse*.—It does not appear that the English word *knight* has any reference to a horse; for knight, or cniht in the Saxon, signified *puer, servus, or attendant*. 2 Seld. tit. hon. c. 5. f. 33.

Note 16, page 428, line 24, words *queen Elizabeth*.—Considerable fees accrued to the king upon the performance of the ceremony. Edward VI. and queen Elizabeth had appointed commissioners to compound with all persons, who had lands to the amount of 40*l.* a year, and who declined the honour and expense of knighthood. Charles the first followed their example; upon which Mr. Hume artfully remarks, that “nothing proves more plainly, how ill-difposed the people were to the measures of government, than to observe, that they loudly complained of an expedient, founded on positive statute, and warranted by such recent precedents.” 6 Vol. 296.

Note 17, page 429, (Table of Precedence) words *Archbishop of Canterbury*.—It is said, that before the conquest, by a constitution of pope Gregory, the two archbishops were equal in dignity, and in the number of bishops subject to their authority; and that William the conqueror thought it prudent to give precedence and superiority to the archbishop of Canterbury; but Thomas archbishop of York, was unwilling to acknowledge his inferiority to Lanfranc archbishop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windsor-castle, they decided in favour of the archbishop of Canterbury. Godw. Comm. de Praesul. 665.

But the archbishops of York long afterwards refused to acquiesce in this decision, for bishop Godwin relates a curious and ludicrous struggle, which took place in the reign of Hen. II. above one hundred years afterwards, between Roger, archbishop of York, and Richard, archbishop of Canterbury, for the chair on the right hand of the pope's legate, *Ib.* 79. Perhaps to this decision, and their former equality, we may refer the present distinction between them; viz. that the archbishop of Canterbury is primate of all England, and the archbishop of York is primate of England.

Note 18, page 430, line 19, word *investiture*.—This creation has long been disused. Esquires, thus created, were invested *calcaribus argentatis*, to distinguish them from the *equites aurati*. In the life of Chaucer, we are told that he was created sentifer to Edward III. Sentifer is the same as armiger; and our word esquire is derived from *sentum*, or the French *escu* a shield.

Note 19, page 430, line 21, words *under the crown*.—I cannot but think that this is too extensive a description of an esquire, for it would bestow that honour upon every exciseman and custom-house officer; it probably ought to be limited to those only who bear an office of trust under the crown, and who are styled esquires by the king in their commissions and appointments; and all I conceive

who are once honoured by the king with the title of esquire, have a right to that distinction for life.

Note 20, page 430, line 27, word *proceedings*.—It is rather remarkable, that the learned judge should have forgotten to mention another class of esquires, who, upon all occasions, assume that distinction with a peculiar and ostentatious degree of confidence. I mean our profession, or the gentlemen at the bar. This arises, perhaps, from an anxiety to retain what they know originally to have been an usurpation; for sir Henry Spelman, with some spleen, informs us, *certè altero hinc seculo nominatissimus in patriâ jurisconsultus, ætate prætor, etiam munere gaudens publico et prædiis amplissimis, generosi titulo bene se habuit; fortè, quod togatæ genti magis tunc conveniret civilis illi appellatio quam æstrensis altera.* *Gloss. voc. Arm.* But this length of enjoyment has established such a right to this distinction, that the court of common pleas refused to hear an affidavit read, because a barrister named in it was not called an esquire. 1 Will. 244.

Note 21, page 431, line 2, words *taken for a gentleman*.—The eldest son has no prior claim to the degree of gentleman; for it is the text of Littleton, that "every son is as great a gentleman as the eldest." Sect. 210.

Note 22, page 431, line 53, words *may be awarded*.—Informations in the nature of *quo warranto*, are not within the statute of additions. 1 Will. 244.

Note 23, page 431, last line, words *of its process*.—These are the ranks and degrees into which the people of England are divided, and which were created, and are preserved, for the reciprocal protection and support of each other. But in order to excite discontent, and to stir up rebellion against all good order and peaceful government, a proposition has lately been industriously propagated, viz. that all men are by nature equal. If this subject is considered even for a moment, the very reverse will appear to be the truth, and that all men are by nature unequal. For though children come into the world equally helpless, yet in a few years, as soon as their bodies acquire vigour, and their minds and passions are expanded and developed, we perceive an infinite difference in their natural powers, capacities, and propensities; and this inequality is still further increased by the instruction which they happen to receive.

Independent of any positive regulations, the unequal industry and virtues of men must necessarily create unequal rights. But it is said that all men are equal because they have an equal right to justice, or to the possession of their rights. This is an insignificant self-evident truth, which no one ever denied, and it amounts to nothing more than to the identical proposition, that all men have equal rights to their rights; for when different men have perfect and absolute rights to unequal things, they are certainly equal with regard to the perfection of their rights, or the justice that is due to their respective claims. This is the only sense in which

equality can be applied to mankind. In the most perfect republic that can be conceived in theory, the proposition is false and mischievous; the father and child, the master and servant, the judge and prisoner, the general and common soldier, the representative and constituent, must be eternally unequal, and have unequal rights.

And where every office is elective, the most virtuous and the best qualified to discharge the duties of any office, have rights and claims superior to others.

One celebrated philosopher has endeavoured to prove the natural equality of mankind, by observing, that "the weakest has strength enough to kill the strongest, either by secret machinations, or by confederacy with others, that are in the same danger with himself." *Hobbes's Lev. c. xii.*

From such a doctrine, supported by such reasons, we cannot be surpris'd at the consequences, when an attempt is made to reduce it to practice.

Subordination in every society is the bond of its existence; the highest and the lowest individuals derive their strength and security from their mutual assistance and dependence; as in the natural body, *the eye cannot say to the hand, I have no need of thee; nor again, the head to the feet, I have no need of you.* Milton, though a favourer of a republic, was so convinced of the necessity of subordination and degrees, that he makes Satan, even when warring against heaven's King, address his legions thus:

If not equal all, yet free,
Equally free; for orders and degrees
Jar not with liberty, but well consist.

B. 5. l. 790.

True liberty results from making every higher degree accessible to those who are in a lower, if virtue and talents are there found to deserve advancement.

In this happy country, the son of the lowest peasant may rise by his merit and abilities to the head of the church, law, army, navy, and every department of the state. The doctrine, that all men are, or ought to be equal, is little less contrary to nature, and destructive of their happiness, than the invention of Procrustes, who attempted to make men equal by stretching the limbs of some, and lopping off those of others.

And till a neighbouring nation adopt more true and rational principles of government, there is every reason to apprehend that their streets will stream with blood, and general misery pervade their land.

CHAPTER THE THIRTEENTH.

Of the Military and Maritime States.

Note 1, page 434, line 27, words *sixty-thousand*.—60,215.

Note 2, page 434, line 29, words *in a year*.—We frequently read of half a knight, or other aliquot part, as for so much land three

knights and a half, &c. were to be returned; the fraction of a knight was performed by a whole knight who served half the time, or other due proportion of it.

Note 3, page 435, line 19, words *military part*.—The military or warlike part of the feudal system was abolished, when personal service was dispensed with for a pecuniary commutation, as early as the reign of Henry II. But the military tenures still remained till 12 Car. II. c. 24. See 2 vol. p. 79.

Note 4, page 437, line 10, words *three years*.—And now for five years by the 26 Geo. III. c. 107. s. 24. which has reduced into one act the former statutes relating to the militia.

Note 5, page 437, line 16, words *out of the kingdom*.—By 26 Geo. III. c. 107. s. 95. in all cases of actual invasion or upon imminent danger thereof, and in all cases of rebellion or insurrection, it shall be lawful for his majesty, the occasion being first communicated to parliament, if sitting, if not sitting, declared in council, and notified by proclamation, to order the militia to be embodied, and to direct them to be led by their respective officers into any parts of this kingdom; but neither the whole, or any part, shall be ordered to go out of Great Britain. See the regulations respecting the militia, stated at large in *Burn*, tit. *Militia*.

Note 6, page 439, line 32, words *be allowed*.—Since this was written, with a genuine love of liberty, by the author, experience has proved, that the most formidable enemy which the people of England have to dread, is their own lawless mobs. Care ought therefore to be taken, that soldiers may never become familiar with the people in great towns, lest they should be more inclined to join, than to quell, a riot.

Note 7, page 442, line 35, words *to the contrary*.—By the 24 Geo. III. sess. 2. c. 6. all officers, soldiers, and mariners, who have been employed in the king's service, since 1763, and have not deserted, and their wives and children, may exercise any trade in any town in the kingdom without exception, and shall not be removed till they are actually chargeable. The same privilege is extended to all officers and soldiers who have been drawn by ballot, and have been honourably discharged, after three years actual service in the militia.

But the employment of a husbandman is not a trade, and therefore he may be removed before he is chargeable. 3 T. R. 133.

Note 8, page 443, line 19, words *laws of England*.—It is now fully established, that both the full pay and half pay of an officer, or any person in a military or naval character, cannot in any instance, be assigned before it is due; as the object of such pay is to enable those who receive it always to be ready to serve their country with that decency and dignity which their respective characters and stations require. 4 T. R. 258. H. Bl. 628.

Note 9, page 444, line 26, words *growth and manufacture*.—By the 26 Geo. III. c. 60. no privileges are to be allowed to any ships

which are not British-built, or built in some part of his majesty's dominions: and every such ship must be registered in the port to which she belongs, according to the directions of that statute, and the 27 Geo. III. c. 19.

Note 10, page 444, line 30, word *subjects*.—Under forfeiture of the ship, and all the goods imported or exported.

Note 11, page 446, line 2, words *crewn alone*.—The legality of pressing is so fully established, that it will not now admit of a doubt in any court of justice. In the case of the King v. Jubbs, Lord Mansfield says, "the power of pressing is founded upon immemorial usage, allowed for ages. If it be so founded and allowed for ages, it can have no ground to stand upon; nor can it be vindicated or justified by any reason but the safety of the state. And the practice is deduced from that trite maxim of the constitutional law of England, 'that private mischief had better be submitted to, than public detriment and inconvenience should ensue.' And though it be a legal power, it may, like many others, be abused in the exercise of it." *Corpus*, 517. In that case, the defendant was brought up by *habeas corpus*, upon the ground that he was entitled to an exemption; but the court held that the exemption was not made out, and he was remanded to the ship from which he had been brought.

Note 12, page 447, (last line) words *less amount*.—But by the last mutiny acts, a soldier, like a seaman, cannot be arrested or taken in execution for any debt less than 20*l*. The statutes except any criminal matter, and thereupon it has been decided, that a soldier may be committed for refusing to indemnify the parish against a bastard child; or for disobeying an order of justices to pay a weekly allowance for it. 5 T. R. 156. 2 T. R. 270.

Here it may not be improper to add, that since the time of queen Anne, a variety of statutes have been passed to encourage attempts to discover the longitude at sea; and by the 14 Geo. III. c. 66. which has repealed the former statutes, it is enacted, that the author of any useful and practicable plan to discover the longitude at sea, either by time-keepers or astronomical calculations, shall be entitled to a reward of 5000*l*. if the longitude can be determined at sea within a degree of a great circle, or sixty geographical miles; to 7500*l*. if within $\frac{1}{2}$ of a degree; and to 10,000*l*. if within $\frac{1}{4}$ a degree. And if any useful discovery shall be made respecting the longitude, though not entitled to those great rewards, or if any beneficial improvement shall be introduced into navigation, the commissioners of the longitude may award such less sum as they may think the ingenuity or industry of the author deserves.

And by 16 Geo. III. c. 6. if any ship discovers a passage between the Atlantic and Pacific oceans, beyond the 52d degree North latitude, the owner or commander, if a king's ship, shall receive 20,000*l*.; and 5000*l*. shall be given in like manner to the first ship that shall approach within one degree of the North pole.

CHAPTER THE FOURTEENTH.

Of Master and Servant.

Note 1, page 451; line 11, words *longer term*.—The meaning of this sentence is not very intelligible. If a right to perpetual service can be acquired lawfully at all, it must be acquired by a contract with one who is free, who is *sui juris*, and competent to contract. Such a hiring may not perhaps be illegal and void. If a man can contract to serve for one year, there seems to be no reason to prevent his contracting to serve for 100 years, if he should so long live: though, in general, the courts would be inclined to consider it an improvident engagement, and would not be very strict in enforcing it. But there could be no doubt, but such a contract with a person in a state of slavery, would be absolutely null and void.

Note 2, page 451; line 25, word *abristian*.—We might have been surprised, that the learned Commentator should condescend to treat this ridiculous notion and practice with so much seriousness, if we were not apprized, that the court of common pleas, so late as the 5 W. & M. held, that a man might have a property in a negro boy, and might bring an action of trover for him, *because negroes are heathens*. 1 *Ld. Ray.* 147. A strange principle to found a right of property upon!

But it was decided in 1772, in the celebrated case of James Somersett, that a heathen negro, when brought to England, owes no service to an American or any other master. James Somersett had been made a slave in Africa, and was sold there; from thence he was carried to Virginia, where he was bought and brought by his master to England; here he ran away from his master, who seized him, and carried him on board a ship, where he was confined, in order to be sent to Jamaica to be sold as a slave. Whilst he was thus confined, lord Mansfield granted a *habeas corpus*, ordering the captain of the ship to bring up the body of James Somersett, with the cause of his detainer. The abovementioned circumstances being stated upon the return to the writ, after much learned discussion in the court of king's bench, the court were unanimously of opinion; that the return was insufficient, and that Somersett ought to be discharged. See Mr. Hargrave's learned argument for the negro in 11 *St. Tr.* 346; and the case reported in *Loff's Reports*, 1. In consequence of this decision, if a ship laden with slaves was obliged to put into an English harbour, all the slaves on board might and ought to be set at liberty. Though there are acts of parliament which recognize and regulate the slavery of negroes, yet it exists not in the contemplation of the common law; and the reason that they are not declared free before they reach an English harbour, is only because their complaints cannot sooner be heard and redressed by the process of an English court of justice.

Liberty by the English law depends not upon the complexion ; and what was said even in the time of queen Elizabeth, is now substantially true, that the air of England is too pure for a slave to breathe in. 2 *Russw.* 468.

Note 3, page 452, line 12, word *peace*.—It is not settled whether justices of peace have jurisdiction over any servants, except those who are employed in husbandry. The title of the statute is, "An act containing divers orders for artificers, labourers, servants of husbandry, and apprentices." But as some of the clauses in the act speak expressly of servants of husbandry, and others of servants generally, it is reasonable to conclude, that the legislature meant to extend the jurisdiction to all servants, where they did not expressly confine it to servants of husbandry ; and as this is supported by the practice of the justices, and by general convenience, I should be inclined to think, that the courts of Westminster hall would determine in favour of the general jurisdiction, if a case was brought before them. See *Cald.* 14. But it has been held that a master may turn away a servant for incontinence, or moral turpitude, without an application to a justice. *Id.*

Note 4, page 452, line 28, word *compulsion*.—The parish officers, with the assent of two justices, may bind a parish apprentice to a person who resides out of their parish, if he has an estate in the parish. 3 *T. R.* 107.

Note 5, page 453, line 4, word *justices*.—By 32 Geo. III. c. 57. where a parish apprentice is discharged from a master on account of the misconduct of the master, the justices may order the master to deliver up his clothes, and to pay a sum not exceeding 10*l.* to place him with another master. See the other provisions of this statute, and the subject stated at large, in *Barn.* tit. *Apprentice*.

Note 6, page 454, line 18, words *early industrious*.—Lord Coke says, this statute was not enacted only that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trade. 11 *Co.* 54.

Note 7, page 454, line 30, word *apprenticeship*.—The penalty is 40*s.* a month, one half to the king, the other half to the prosecutor. The words of the statute are, *having served as an apprentice*, and there can be no doubt but the legislature intended that the tradesman should have served an actual apprenticeship ; but from the words, *as an apprentice*, this being a penal statute, the judges have determined that he serves as an apprentice, who for seven years has been working as a master. 2 *Will.* 168 ; or as the master's wife. 1 *Barnard.* 367.

Note 8, page 454, (last line) word *departure*.—Or rather of complaint to a magistrate to be discharged.

Note 9, page 455, line 11, words *their wages*.—But it is the practice of justices, in disputed cases, to assess the wages of all servants ; a practice which I am inclined to think would be supported under the 20 Geo. II. c. 19.

Note 10, page 455, line 24, words *loss of his service*.—This is an action upon the case, generally called a *per quod servitium amisit*. This action by a master for beating his servant, has been contrived, by a species of fiction, to be extended to a parent, to enable him to recover a pecuniary compensation, under some circumstances, for the seduction of his daughter. See 3 vol. p. 143, note.

Note 11, page 456, line 23, words *to the robbery*.—But it has been long established law, that the innkeeper is bound to restitution if the guest is robbed in his house by any person whatever; unless it should appear that he was robbed by his own servant, or by a companion whom he brought with him. 8 Co. 33.

Note 12, page 457, line 17, word *authority*.—And if I once pay for what my servant has bought upon trust, without expressing any disapprobation of it, it is equivalent to a direction to trust him in future; and I shall be answerable for all he takes up upon credit, till an express order is given to the tradesman not to give him further credit.

Note 13, page 458, (last line) word *wrong*.—The law which obliges masters to answer for the negligence and misconduct of their servants, though sometimes severe upon an innocent person, is founded upon principles of public policy; in order to induce masters to be careful in the choice of their servants, upon whom both their own security and that of others so greatly depends. And to prevent masters from being imposed upon in the characters of their servants; it is enacted by 32 Geo. III. c. 56. that if any person shall give a false character of a servant, or a false account of his former service; or if any servant shall give such false account, or shall bring a false character, or shall alter a certificate of a character, he shall, upon conviction before a justice of the peace, forfeit 20*l.* with 10*s.* costs. The informer is a competent witness. But if any servant will inform against an accomplice, he shall be acquitted.

An action was tried at the sittings after Trinity term, 1792, at Guildhall, against a person who had knowingly given a false character of a man to the plaintiff, who was thereby induced to take him into his service. But this servant soon afterwards robbed his master of property to a great amount, for which he was executed. And the plaintiff recovered damages against the defendant to the extent of his loss. This was an action of great importance to the public, and there can be no doubt but it was founded in strict principles of law and justice.

CHAPTER THE FIFTEENTH.

Of Husband and Wife.

Note 1, page 461, line 12, words *God's law*.—In this statute the prohibitions by God's law are not specified; but in the 25 Hen. VIII. c. 22. and 28 Hen. VIII. c. 7. the prohibited degrees are particularized. It is doubtful whether these two last statutes are in force. 2 Burn. Ec. 405. But so far they seem only to be declar-

tory of the Levitical law. The former declared null and void the marriage between Hen. VIII. and Catharine of Arragon, the widow of his eldest brother, prince Arthur ; for which a dispensation had been obtained from the pope.

The question respecting the validity of this dispensation produced that quarrel between the king and the pope, which ended in the abolition of the dominion of the latter in this country : and, the inconstancy of that capricious king's affections accelerated the reformation of our religion.

Note 2, page 461, line 21, words *Levitical degrees*.—The prohibited degrees are all which are under the 4th degree of the civil law, except in the ascending and descending line, and by the course of nature it is scarcely a possible case that any one should ever marry his issue in the 4th degree ; but between collaterals it is universally true, that all who are in the 4th or any higher degree are permitted to marry ; as first cousins are in the 4th degree, and therefore may marry, a nephew and great aunt, or niece and great uncle, are also in the 4th degree, and may intermarry ; and though a man may not marry his grandmother, it is certainly true that he may marry her sister. *Gibf. Cod.* 413. See the computation of degrees by the civil law, 2 vol. p. 209. The same degrees by affinity are prohibited. Affinity always arises by the marriage of one of the parties so related ; as a husband is related by affinity to all the *consanguinei* of his wife ; and *vice, versâ* the wife to the husband's *consanguinei* : for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity. *Gibf. Cod.* 412. Therefore a man after his wife's death cannot marry her sister, aunt, or niece. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. Hence two brothers may marry two sisters, or father and son a mother and daughter : or if a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry ; for though I am related to my wife's brother by affinity, I am not so to my wife's brother's wife, whom, if circumstances would admit, it would not be unlawful for me to marry.

Note 3, page 461, line 34, word *canonists*.—A contract *per verba de presenti tempore* used to be considered in the ecclesiastical courts *ipsum matrimonium*, and if either party had afterwards married, this, as a second marriage, would have been annulled in the spiritual courts, and the first contract enforced. See an instance of it 4 Co. 29. But as this pre-engagement can no longer be carried into effect as a marriage, I think we may now be assured that it will never more be an impediment to a subsequent marriage actually solemnized and consummated.

Note 4, page 462, line 13, words *as a felony*.—See the exceptions, 4 vol. 164.

Note 5, page 463, line 3, word *neither*.—This proposition is too generally expressed ; for there are various contracts between a

person of full age and a minor, in which the former is bound and the latter is not. The authorities seem decisive that it is true with regard to the contract of marriage referred to the ages of 14 and 12; but it has also long been clearly settled that it is not true with regard to contracts of marriage referred to the minority under twenty-one.

For whete there are mutual promises to marry between two persons, one of the age of 21 and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action and recover damages, but no action can be maintained for a similar breach of the contract on the side of the minor. Holt v. Ward Clarendon, Str. 937. S. C. Fitzg. 175. 275.

Note 6, page 463, line 15, words *be sworn to*.—By the 26 Geo. II. c. 33. s. 7, if any clergyman shall marry a couple out of a church or a public chapel, where banns had been usually published before 1754, unless by special license from the archbishop; or shall marry them without a license, or publication of banns; he shall be guilty of felony, and shall be transported for 14 years. And there have been instances of convictions for this offence.

Note 7, page 463, line 20, words *during the husband's*.—The construction of the statute seems clear, that it shall also go to the next heir during the life of the wife, even after the death of the husband. 1 Brown. Ch. Rep. 23.

Note 8, page 464, line 8, words *mother or guardians*.—A matter of such importance deserves to be more particularly stated; the party under age marrying by license, if a minor, and not having been married before, must have the consent of a father, if living; if he be dead, of a guardian *lawfully appointed*; if there be no such guardian, then of the mother if she is unmarried; if there be no mother, then of a guardian appointed by the court of chancery. The guardian whose consent is interposed between that of the father and that of the mother, must either be a testamentary guardian appointed by the father's will, or a guardian appointed by chancery; or if there is no such guardian, and the minor under the age of fourteen, and has lands by descent, perhaps the consent of a feoffee guardian would be sufficient; though it might not be prudent to rely upon it alone, and such an early marriage now seldom happens.

Note 9, page 464, line 14, words *other incapacity*.—The words of the statute are, "if any such guardian, or mother, or any of them, whose consent is made necessary, shall be *non compos mentis*," &c. Under the words *any of them*, I conceive that the chancellor would think himself enabled to consent for a father, whose consent it was thus impossible to obtain.

Note 10, page 464, line 21, words *totally void*.—Till the 2 & 3 Edw. VI. c. 8 the clergy in this country were prohibited to marry.

by various laws and canons; a statute in the 31 Hen. VIII. c. 14 having even made it felony. But the legislature by 2 & 3 Edw. VI. c. 21. repealed the laws and canons which imposed that severe restriction upon the clergy, and granted them the same indulgence that the laity enjoyed. The preamble to that statute, as almost all the preambles to the statutes in that short reign, is expressed with a remarkable degree of eloquence. "Although it were not only better for the estimation of priests and other ministers in the church of God, to live chaste, sole, and separate from the company of women, and the bond of marriage; but also thereby they might the better intend to the administration of the gospel, and be less intricate and troubled with the charge of household, being free and unburthened from the care and cost of finding wife and children; and that it were most to be wished, that they would willingly and of themselves endeavour themselves to a perpetual chastity and abstinence from the use of women: yet, forasmuch as the contrary hath rather been seen, and such uncleannesses of living, and other great inconveniences not meet to be rehearsed, have followed of compelled chastity, and of such laws as have prohibited those the godly use of marriage; it were better, and rather to be suffered in the commonwealth, that those which could not contain, should, after the counsel of scripture, live in holy marriage, than feignedly abuse with worse enormity, outward chastity or single life." But this statute, like all the other reforms in the church, was repealed by queen Mary; and it was not revived again till the 1 Ja. I. c. 25. though the thirty-nine articles had been passed in convocation in the fifth year of the reign of queen Elizabeth; the 32d of which declares, that it is lawful for the bishops, priests, and deacons, as for all other christian men, to marry at their own discretion.

The clerks in chancery, though laymen, were not allowed to marry till the 14 and 15 Hen. VIII. c. 8. And no lay doctor of civil law, if he was married, could exercise any ecclesiastical jurisdiction till 37 Hen. VIII. c. 7. 2 *Burn. Ec. L.* 418.

Note 11, page 465; line 34; words *public chapel*.—The marriage act requires, that the marriage shall be celebrated in some parish church or public chapel, where banns had been usually published; i. e. before the 25th March, 1754. In consequence of this construction, the court of king's bench were obliged to declare a marriage void, which had been solemnized in a chapel erected in 1765. (*Dowd.* 659.) And as there were many marriages equally defective, an act of parliament was immediately passed, which legalized all marriages celebrated in such churches or chapels, since the passing of the marriage act; and it also indemnified the clergymen from the penalties they had incurred. 22 *Geo. III. c.* 53.

Note 12, page 466; line 37, words *corporal imbecility*.—Corporal imbecility may arise after the marriage, which will not then vacate the marriage, because there was no fraud in the original contract; and one of the ends of marriage, viz. the legitimate procreation of

children, may have been answered: but no kindred by affinity can happen subsequently to the marriage; for as affinity always depends upon the previous marriage of one of the parties so related; if a husband and wife are not so related at the time of the marriage, they never can become so afterwards.

Note 13, page 467, line 31, words *by the canons*.—A husband cannot obtain a divorce in the ecclesiastical courts for the adultery of his wife if she recriminates, and can prove that he also has been unfaithful to the marriage vow; this seems to be founded on the following rational precept of the civil law, *judex adulterii ante oculos habere debet et inquirere, an maritus pudicè vivens; mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibuit.* 14. 48. §. 13.

Note 14, page 467, line 34, words *act of parliament*.—To prevent divorces a vinculo matrimonii from being obtained in parliament by fraud and collusion, the two houses not only examine witnesses to be convinced of the adultery of the wife, but they require also that the husband shall have obtained a sentence of divorce in the spiritual courts, and a verdict with damages in a court of law from some one who has had criminal intercourse with the wife.

Note 15, page 468, line 21, word *coverture*.—Whatever may be the origin of *feme-covert*, it is not perhaps unworthy of observation, that it nearly corresponds in its significations to the Latin word *nupta*; for that is derived a nubendo, i. e. *tegendero*, because the modesty of the bride, it is said, was so much consulted by the Romans upon that delicate occasion, that she was led to her husband's home covered with a veil.

Note 16, page 468, line 30, words *covenant with himself*.—But the husband may grant to the wife by the intervention of trustees; *Harg. Co. Litt.* 30; and he may surrender a copyhold to her use. 4 Co. 29.

Note 17, page 469, line 5, words *he is not chargeable*.—What are necessaries must be ascertained by a jury from the rank and circumstances of the husband.

Note 18, page 469, line 11, words *circumstances together*.—But though the husband has had a great fortune with his wife, if she dies before him, he is not liable to pay her debts contracted before marriage, either in law or equity, unless there is some part of her personal property which he did not reduce into his possession before her death, which he must afterwards recover as her administrator; and to the extent of the value of that property, he will be liable to pay his wife's debts, *dum sola*, which remained undischarged during the coverture. 1 P. Wms. 468.

Note 19, page 469, line 19, words *dead in law*.—This principle has lately been extended; and it has been decided by the court of king's bench, that where a married woman is separated from her husband and is allowed a separate maintenance by deed, if she then contracts debts, she may be sued as a *feme sole*. *Corbet v. Baron*

Polocnütz and wife. 1 *T. R.* 5. The authority of this decision was at the first much questioned; but it seems now to be acquiesced under.

It is also held, that if the wife spends the whole of her settlement and allowance, the husband will not afterwards be liable even for necessaries. 14.

Note 20, page 470, line 6, words *seipsum accusare*.—The union of person is scarce sufficient to account for this rule of law; for the confessions of the husband or wife are no evidence against the other, yet the confessions of the party are legal evidences: but the better reason seems to be, that which is generally assigned, *viz.* if a wife were a witness for her husband, she would be under a strong temptation to commit perjury; and if against her husband, it would be contrary to the policy of marriage, and might create much domestic dissension and unhappiness: so *vice versa* of the husband. *Bull. N. P.* 286. But this rule, I should think, ought to be confined to cases where the husband or wife is a party in the action or prosecution; yet in one case it seems to have been held, that a wife shall not be called in any case to give evidence, even tending to criminate her husband. 2 *T. R.* 263. If this be true, a plaintiff or prosecutor may have the benefit of the testimony of the one, and the defendant or prisoner cannot have the benefit of the testimony of the other; because the evidence of the latter would tend to charge the former with perjury. Surely in such cases, where the interests of strangers are concerned, the furtherance of public justice is a consideration far superior to the policy of marriage, or the domestic stifes of the witnesses.

Note 21, page 470, line 24, words *without her husband*.—A feme covert having a separate estate, may, in a court of equity, be sued as a feme sole, and be proceeded against without her husband; for, in respect of her separate estate, she is looked upon as a feme sole. 2 *Ver.* 614. And in a court of equity, baron and feme are considered as two distinct persons, and therefore a wife by her prochein amy, may sue her own husband. 3 *Cox. P. Wms.* 39.

Note 22, page 471, line 1, words *law excuses her*.—This constraint and coercion of the husband is presumed, when the wife is in company with the husband.

Note 23, page 471, (last line) words *larus of England*.—Nothing, I apprehend, would more conciliate the goodwill of the student in favour of the laws of England, than the persuasion that they had shewn a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve. In addition to what has been observed in this chapter, by the learned Commentator, I shall here state some of the principal differences in the English law, respecting the two sexes; and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth:

Husband and wife, in the language of the law, are stiled *baron* and *feme*: the word *baron*, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect, that if the baron kills his feme, it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime, a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason, (though in petit treason the punishment of men was only to be drawn and hanged,) till the 30 Geo. HL c. 48. the sentence of women was to be drawn and burnt alive. 4 Vol. 204.

By the common law all women were denied the benefit of clergy; and till the 3 & 4 W. & M. c. 9. they received sentence of death, and might have been executed, for the first offence in simple larceny, bigamy, manslaughter, &c. however learned they were, merely because their sex precluded the possibility of their taking holy orders; though a man who could read, was for the same crime subject only to burning in the hand and a few months imprisonment. 4 Vol. 369.

These are the principal distinctions in criminal matters; now let us see how the account stands with regard to civil rights.

Intestate personal property is equally divided between males and females; but a son, though younger than all his sisters, is heir to the whole of real property.

A woman's personal property, by marriage, becomes absolutely her husband's, which at his death he may leave entirely away from her; but if he dies without will, she is entitled to one-third of his personal property, if he has children; if not, to one-half. In the province of York, to four-ninths or three-fourths.

By the marriage, the husband is absolutely master of the profits of the wife's lands during the coverture; and if he has had a living child, and survives the wife, he retains the whole of those lands, if they are estates of inheritance, during his life: but the wife is entitled only to dower, or one-third, if she survives, out of the husband's estates of inheritance; but this she has, whether she has had a child or not.

But a husband can be tenant by the courtesy of the trust estates of the wife, though the wife cannot be endowed of the trust estates of the husband. 3 P. Wms. 229.

With regard to the property of women, there is taxation without representation; for they pay taxes without having the liberty of voting for representatives; and indeed there seems at present no substantial reason why single women should be denied this privilege. Though the chastity of women is protected from violence, yet a parent can have no reparation, by our law, from the seducer of his daughter's virtue, but by stating that she is his servant, and that

by the consequences of the seduction, he is deprived of the benefit of her labour; or where the seducer, at the same time, is a trespasser upon the close or premises of the parent. But when by such forced circumstances the law can take cognizance of the offence, juries disregard the pretended injury, and give damages commensurate to the wounded feelings of a parent.

Female virtue, by the temporal law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in conversation, that the purest maid, or the chasteest matron, is the most meretricious and incontinent of women, with impunity, or free from the animadversions of the temporal courts. Thus female honour, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator. 3 Vol. 125.

From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favour to the female sex.

CHAPTER THE SIXTEENTH.

Of Parent and Child.

Note 1, page 474, line 28, words *shall direct*.—That is, they may respectively be compelled to allow each other 20s. a month, or 13l. a year; but that is the greatest allowance which a son can be obliged to make an aged parent, or a father a legitimate child, by our law.

Note 2, page 474, (last line) words *charge the husband*.—It has lately been decided, that the authorities here relied upon by the learned Commentator never were law; and that a husband is not bound, even whilst his wife is alive, to support her parents, or her children, by a former husband; or any other relation; for the statute 43 Eliz. c. 2. extends only to relations by blood. 4 T. R. 218. But I conceive if the wife had separate property, an order might be made upon her alone, to support her children and relations.

Note 3, page 475, line 27, words *entitled to none*.—It was not held that she was entitled to none, because she was the daughter of a Jew, but because the order did not state that she was poor, or likely to become chargeable to the parish.

Note 4, page 478, line 2, words *real estate for life*.—By the 31 Geo. III. c. 32. no person professing the Roman catholic religion, who shall take and subscribe the oath required by that statute, shall be subject to the penalties in the statutes referred to in the preceding page.

Note 5, page 479, line 5, words *comes of age*.—Where children have fortunes independent of their parents, Lord Thurlow declared, that it was the practice in chancery to refer it to the master, to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and

this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father; under which circumstance it was a legacy to him. 1 Bro. 388.

Note 6, page 480, line 24, words *parental piety*.—The words of the statute are, “the father and grandfather, mother and grandmother, and children of every poor and impotent person,” &c. from which words, and a former statute, Dr. Burn is inclined to think, even contrary to the opinion of Lord Holt, that a grandchild is not compellable to relieve an indigent grandfather: but I should entertain no doubt but the court of King’s bench would determine the duty to be reciprocal; and would construe any ambiguous expression in favour of the discharge of such a natural and moral obligation.

Note 7, page 482, line 27, words *be with child or not*.—In a case, where an estate was devised to a male child which might be born within forty weeks after the death of the testator or a married woman, whose husband had been long abroad, and if no such child, the estate was devised over, this writ *de ventre inspiciendo* was awarded against the woman on the petition of the subsequent devisee. 4 Bro. 90. See the proceedings under this writ. 2 P. Wms. 591.

Note 8, page 483, line 28, words *pro legitimatione*.—It used to be held, that, when the husband was living within the kingdom, access should be presumed, unless strict proof was adduced that the husband and wife were all the time living at a distance from each other; but the courts have relaxed that rule, and have gone the length of holding that the legitimacy or illegitimacy of the child of a married woman, living in a notorious state of adultery, under all the circumstances, is a question for a jury to determine. 4 T. R. 356. and 251.

Note 9, page 484, line 28, words *the child*.—If he gives a bond to indemnify the parish, and neglects to provide maintenance for the child, the parish officers may relieve it without an order from a justice, and may recover the money advanced in an action upon the bond. 11, Bk. 253.

Note 10, page 484, line 32, words *shall be discharged*.—Or he shall be discharged, if the justices at the sessions, upon hearing all the circumstances of the case, shall be of opinion that he is not the father of the child.

Note 11, page 485, line 15, words *filius populi*.—But though he is considered *filius nullius* with respect to inheritances and successions, yet the law takes notice of his connexion with his natural parents for some other purposes, as it has been decided that if a bastard marries under age by license, he must have the consent of his putative father, guardian, or mother, according to the 26 Geo. II. c. 33. 1 T. R. 96.

Note 12, page 486, line 8, words *and another man*.—Bastards are not favoured in equity as legitimate children. The court will not

supply the defect of a surrender of a copyhold in a conveyance or devise by a father to a natural child, as it will in favour of a legitimate child. *Gill. For. Rem.* 296. 2 *Ves.* 58a.

See farther concerning bastards, 2 vol. 250, & 550.

CHAPTER THE SEVENTEENTH.

Of Guardian and Ward.

Note 1, page 488, line 5, words *for the profits*.—But an executor is not justified in paying to the father a legacy left to the child; and if he pays it to the father, and the father becomes insolvent, he may be compelled to pay it over again. 1 *P. Wms.* 285.

Note 2, page 489, line 8, word *decurandum*.—Lord chancellor Macclesfield has vehemently condemned the rule of our law, that the next of kin, to whom the land cannot descend, is to be the guardian in socage; and has declared, that “it is not grounded upon reason, but prevailed in barbarous times, before the nation was civilized.” 2 *P. Wms.* 262. But as the law has placed the custody of the infant under the care of one who is just as likely to be in a near degree of kindred as the heir; one who probably will have the same affection for his person, without having any interest in even wishing his death, and therefore removed from all suspicion, however ill-founded; I cannot but think there is more wisdom in placing the infant under the guardianship of such a relation, than under that of the next heir.

A socage guardian can only be where the infant takes lands by descent. If he has lands by descent both *ex parte paterna* and *ex parte materna*, then the next of kin on each side shall, respectively, be guardians by socage of these lands; and of these two claimants the first occupant shall retain the custody of the infant's person. See Mr. Hargrave's notes to Co. Litt. 88. where these different kinds of guardianship are with great learning and perspicuity discriminated and discussed.

Note 3, page 489, line 22, words *twenty years*.—By this statute the father may dispose of the guardianship of any child unmarried under the age of twenty-one, by deed or will, executed in the presence of two or more witnesses, till such child attains the age of twenty-one, or for any less time. And the guardian, so appointed, has the tuition of the ward, and the management of his estate and property.

A father cannot appoint guardians under this statute to a natural child; but where he has named guardians by his will to an illegitimate child, the court of chancery will appoint the same persons guardians without any reference to a master for his approbation. 2 *Ero.* 583.

Note 4, page 491 line 1, words *person's birth*.—If he is born on the 1st of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-

one years by near forty-eight hours: the reason assigned is, that in law there is no fraction of a day; and if the birth were on the first second of one day, and the act on the last second of the other, then twenty-one years would be complete; and in the law it is the same whether a thing is done upon one moment of the day or on another.

Note 5, page 498, line 13, word *etatem*.—In such cases, ~~the~~ *etatem* that justice tempered with mercy would inquire whether the malice is of such a hardened degree that a slighter punishment would not eradicate or correct it, and whether a milder sentence would not be sufficient to deter other boys of the same age from a repetition of the crime.

Note 6, page 493, line 22, word *necessaries*.—It has been held, that an infant is not liable to repay money lent to him, although he should lay it out in necessaries. 1 *Salk.* 386. Nor is he bound to pay for goods bought to trade with. *Bull. N. P.* 154. But debts contracted during infancy are a good consideration to support a promise made to pay them, when a person is of full age. Infancy may be given in evidence upon the general issue, or it may be pleaded. *Bull.* 152.

And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promise or contract when he was of age; the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy. 1 *T. R.* 648.

CHAPTER THE EIGHTEENTH.

Of Corporations.

Note 1, page 498, line 23, words *merely civil corporations*.—It is now fully established that each university is a civil corporation. 3 *Burr.* 1656.

Note 2, page 498, (last line) words *ecclesiastical bodies*.—They are lay corporations because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitations of the ordinary or diocesan in their spiritual characters.

Note 3, page 502, line 11, word *incorporation*.—But it may have a name only by implication; as if the king should incorporate the inhabitants of Dale with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty. 1 *Salk.* 191. And it may change its name, as corporations frequently do in new charters, and it still retains its former rights and privileges. 4 *Co.* 87.

Note 4, page 502, line 22, words *such as go off*.—And, where the mode of election is not prescribed by the charter, or established by immemorial usage, it may be regulated by a by-law. 3 *T. R.* 189. When the electors are described in the charter, their number, in order to avoid riot and confusion, may be restrained by a by-law; but a by-law cannot strike off an integral part, neither can it par-

saw the number of persons out of whom the election is to be made. 3 Burr. 1833. But the number of the electors or members of parliament cannot be diminished by a by-law. 4 Inst. 42.

Note 5, page 502, line 27, words *to the former*.—All corporations must have a license from the king, to enable them to purchase and hold lands in mortmain. Co. Litt. 2. 7 & 8 W. 3. c. 37.

Note 6, page 503, line 7, words *body politic*.—Where the power of making by-laws is in the body at large, they may delegate their right to a select body, who thus become the representative of the whole community. Ed. Mansfield, 3 Burr. 1837.

Note 7, page 504, line 34, words *careful to avoid*.—Mr. Hargrave considers the jewels of the crown rather as heir-looms, than an inheritance of chattels passing in succession in a sole corporation. Co. Litt. 9. n. 1.

Note 8, page 505, line 3, words *no particular statutes*.—Their charters or immemorial usages, which are equivalent to the express provisions of a charter, are in fact their statutes.

Note 9, page 505, (last line) words *any such society*.—This act clearly treats all private statutes, both prior and subsequent to its date, which acquire the countenance of more than a majority to give validity to any grant or election. The learned judge is of opinion, that it has not affected the negative given by the statutes to the head of any society; but I am inclined to think this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by *guardianus et major pars, scilicet, rector, or propositus et major pars*; and it has been determined by the court of king's bench, (Goup. 377.) and by the visitors of Clare-hall, Cambridge, and also by the visitors of Dublin college, that this expression does not confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and that he is concluded by a majority of votes against him.

Note 10, page 506, line 25, words *mortua manu*.—If I might add another conjecture upon the origin of this word, I should say that lands held by a corporation, on account of the perpetuity of succession, did not yield to the lord the great feudal fruits of relief, wardship, and marriage; and for that reason they might be said to be held in a dead or unproductive hand.

Note 11, page 508, (note) words *visitatorial power*.—And it wants, I conceive, another mark of visitatorial power; which is, the discretion of a visitor, voluntarily to regulate and superintend. The court of king's bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; but it is not the language of the profession to call that part of their authority a visitatorial power.

Note 12, page 510, line 15, words *visitatorial authority*.—That is, the bishop of Lincoln, from whose diocese that of Oxford was taken.

Note 13, page 510, line 20, words *same original*.—In the university of Cambridge, I am inclined to think, that the bishop of Ely has no visitatorial authority from prescription ; but that in every instance, in which he is visitor, he is appointed by the express declaration and special provision of the founder. He, without doubt, was fixed upon from the dignity of his station and the proximity of his residence.

Note 14, page 511, line 18, words *within his power*.—No particular form of words is necessary for the appointment of a visitor. *Sit visitator, or visitationem commendamus*, will create a general visitor, and confer all the authority incidental to the office ; (1 Burr. 199.) but this general power may be restrained and qualified, or the visitor may be directed by the statutes to do particular acts, in which instances he has no discretion as visitor : as where the statutes direct the visitor to appoint one of two persons, nominated by the fellows, the master of a college ; the court of king's bench will examine the nomination of the fellows, and if correct, will compel the visitor to appoint one of the two. 2 T. R. 290. New engrafted fellowships, if no statutes are given by the founders of them, must follow the original foundation, and are subject to the same discipline and judicature. 1 Burr. 203. It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes and the nature of the institution ; and in the exercise of this jurisdiction he is free from all control. Lord Mansfield has declared, that " the visitatorial power, " if properly exercised, without expense or delay, is useful to and " convenient to colleges ; and it is now settled and established, " that the jurisdiction of a visitor is summary, and without appeal " from it." 1 Burr. 200.

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MR. CHRISTIAN'S NOTES

TO

BLACKSTONE'S COMMENTARIES.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER THE FIRST.

Of Property, in general.

Note 1, page 8, line 39, word *refinement*.—BUT it is of great importance that moral obligations and the rudiments of laws should be referred to true and intelligible principles, such as the minds of serious and well-disposed men can rely upon with confidence and satisfaction.

Mr. Locke says, "that the labour of a man's body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his own, and thereby makes it his labour with, and joined to it something that is his property." (*On Gov. c. 5.*)

But this argument seems to be a *petitio principii*; for mixing labour with a thing, can signify only to make an alteration in its shape or form; and if I had a right to the substance, before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone: if I had no right before, it is clear that I have none after; and we have not advanced a single step by this demonstration. The account of Grotius and Puffendorf, who maintain that the origin and inviolability of property are founded upon a tacit promise or compact, and therefore we cannot invade another's property without a violation of a promise or a breach of good faith, seems equally, or more superfluous and inconclusive.

There appears to be just the same necessity to call in the aid of a promise to account for, or enforce, every other moral obligation, and to say that men are bound not to beat or murder each other, because they have promised not to do so. Men are bound to fulfil

their contracts and engagements, because society could not otherwise exist; men are bound to refrain from another's property, because also society could not otherwise exist. Nothing therefore is gained by resolving one obligation into the other.

But how, or when, then, does property commence? I conceive no better answer can be given, than by occupancy, or when any thing is separated for private use from the common stores of nature. This is agreeable to the reason and sentiments of mankind, prior to all civil establishments. When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the fountain that springs at his feet; if he is driven by any daring intruder from this repast, so easy to be replaced, he instantly feels and resents the violation of that law of property, which nature herself has written upon the hearts of all mankind.

Note 2, page 10, line 28, words *world besides*.—Upon whatever principle the right to property is founded, the power of giving and transferring seems to follow as a natural consequence; if the hunter and the fisherman exchange the produce of their toils, no one ever disputed the validity of the contract, or the continuance of the original title. This does not seem to be aptly explained by occupancy, for it cannot be said that in such a case there is ever a vacancy of possession.

Note 3, page 11, line 24, words *merely a civil right*.—I cannot agree with the learned Commentator, that the permanent right of property vested in the ancestor himself, (that is, for his life) is not a natural, but merely a civil right.

I have endeavoured to shew (Note 1.) that the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements. If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each other's property, as from attacking and assaulting each other's persons. And I am obliged also to differ from the learned Judge, and all writers upon general law, who maintain, that children have no better claim by nature to succeed to the property of their deceased parents than strangers; and that the preference given to them, originates solely in political establishments. (See the Editor's distinctions between natural and positive laws, Vol. i. p. 58. n. 7.) I know no criterion by which we can determine any rule or obligation to be founded in nature, than its universality; and by inquiring, whether it is not, and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind. The affection of parents towards their children is the most powerful and universal principle which nature has planted in the human breast; and it cannot be conceived, even in the most savage state, that any one is so destitute of that affection and reason, who would not revolt at the position, that a stranger has as good a right as his children to the property of a deceased parent.

Heredes successoresque sui cuiusque liberi, seems not to have been confined to the woods of Germany, but to be one of the first laws in the code of nature; though positive institutions may have thought it prudent to leave the parent the full disposition of his property after his death, or to regulate the shares of the children, when the parent's will is unknown.

Note 4, page 12, line 33, words *as at present*.—By 32 Hen. VIII. c. 1. all socage lands were made devisable, and two thirds of lands of military tenure; when these at the restoration were converted into socage tenure, all lands became devisable, some copyholds excepted. P. 379.

Note 5, page 13, line 6, words *lords of manors*.—The learned Judge has frequently repeated in his commentaries, that all the game belongs to the king, or to his grantees, being usually the lords of manors. This is a doctrine which the editor is obliged to controvert. His reasons and authorities will be stated at large in a note to page 423.

CHAPTER THE SECOND.

Of Real Property; and first, of Corporal Hereditaments.

Note 1, page 19, line 3, words *name of a castle*.—By the name of a castle, one or more manors may be conveyed; and *converso* by the name of a manor, a castle may pass. 1 *Inst.* 5. 2 *Inst.* 31.

CHAPTER THE THIRD.

Of Incorporeal Hereditaments.

Note 1, page 22, line 6, words *by verbal grant*.—The present learned Vinerian professor, Mr. Wooddeson, has taken notice of this inaccuracy, and has observed, that "advowsons, merely as such (*i. e.* in gross,) could never in any age of the English law, pass by oral grant without deed." (2 Vol. 64.) Lord Coke says expressly, that "grant is properly of things incorporeal, which cannot pass without deed." (1 *Inst.* 9.) But before the statute of frauds, 29 Car. II. c. 3. any freehold interest in corporeal hereditaments, might have passed by a verbal feoffment, accompanied with livery of seizin. (*Litt.* 8. 59.) And by such a verbal grant of a manor, Mr. Wooddeson justly observes, before the statute, an advowson appendant to it might have been conveyed. (2 Vol. 64.) But he who has an advowson, or a right of patronage in fee, may by deed transfer every species of interest out of it, *viz.* in fee, in tail, for life, for years, or may grant one or more presentations.

Although this is a right of great value, yet the possession of it never can yield any lucrative benefit to the owner, as the law has provided that the exercise of this right must be perfectly gratuitous; yet it may be a provision for relations, a pledge of friendship, or what is its true use and object, the reward of learning and virtue.

Hence the mortgager shall present when the church is vacant, though the advowson alone is mortgaged in fee, for the mortgagee could derive no advantage from the presentation in reduction of his debt. (3 *Aik.* 539.) And for the same reason, it should seem, if a church became vacant before the assignees had sold an advowson, part of the estate of a bankrupt, the bankrupt shall present upon that vacancy, as the law did not intend to deprive him of any right, which could afford no substantial benefit to his creditors. And it is now fully settled, that neither the next presentation nor the advowson can be sold whilst the church is vacant. 3 *Burr.* 1540. An advowson is affeys in the hands of the heir. 3 *Bro. P. C.* 356.

But if during the avoidance of a church the patron die, the right to that presentation passes to his executor or personal representative, unless it is a donative benefice, and in that case the right of donation descends to the heir. 2 *Wils.* 150.

Note 2, page 23, line 9, words *instituted or induction*.—Two peculiar properties of donatives may be mentioned here; one is, that the presentation does not devolve to the king, as in other livings, when the incumbent is made a bishop: (*Ca. Parl.* 184) the other is taken notice of by Mr. Wooddison, that donatives are within the statute of pluralities, if a donative is the first living; but if a donative is the second benefice taken without a dispensation, the first would not be void, for the words of the statute are, *instituted and inducted to any other*, which are not applicable to donatives. 1 *Vol.* 330. And therefore it seems if donatives are taken last, they may be held with any other preferment.

Note 3, page 24, line 10, words *ecclesiastical livings*.—The contrary is held by a later authority than the authorities referred to by the learned judge; in which it was declared, that although a presentation may destroy an impropriation, yet it cannot destroy a donative, because the creation thereof is by letters patent. 1 *Salk.* 541.

Note 4, page 22, line 24, words *profits is due*.—But personal tithes are only payable by a special custom, and perhaps are now paid nowhere in England, except for fish caught in the sea, and for corn mills. 3 *Burn. Ec.* 473.

Note 5, page 24, line 27, words *are usually due*.—This is a very important subject, but the discussion of it here would have no immediate reference to the author's text, and it would be too extensive for a note; it will therefore be reserved by the editor for the supplemental volume.

Note 6, page 24, line 36, word *casual*.—Tithes may be payable of deer and rabbits by special custom.

Note 7, page 25, line 25, words *temporal sanctions*.—The clergy have precisely the same right to tithes, as the heir at law has to his ancestor's estate, or the farmer to the possession in consequence of his lease; and the proprietor has no more reason to complain that his land is not tithe-free, than he has that his neighbour's field is not his own.

Note 8, page 29, line 14, words *authority of parliament*.—Such a composition made since the 13 Eliz though confirmed by a decree of the court of chancery, is not binding upon the succeeding incumbent. (2 Woodd. 107.)

With regard to compositions entered into between the tithe-owner and any parishioner, for the latter to retain the tithe of his own estate, it has been decided that they are analogous to leases from year to year, between landlord and tenant; and if they are paid without, or beyond an agreement for a specific time, they cannot be put an end to without six months notice before the time of payment; and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive tithe in kind; an objection not permitted to a tenant, who denies the right of the landlord. Case of Kensington. 2 Rayner. 2 Bro. 1651.

Note 9, page 31, line 19, words *much later original*.—To constitute a good modus, it seems necessary that it should be such as would have been a certain, fair, and reasonable equivalent or composition for the tithes in kind, before the year 1189; and therefore no modus for hops, turkeys, or other things introduced into England since that time, can be good. Bunn. 307.

The question of rankness, or rather modus or no modus, is a question of fact, which courts of equity will send to a jury, unless the grossness of the modus is so obvious as to preclude the necessity of it. 2 Bro. 163. 2 Bl. R. 420.

Note 10, page 30, line 21, words *not generally titheable*.—But it seems to be determined that the king's tenant for years, or at will, is not liable to pay tithes on account of the dignity of the king, who cannot be presumed to have leisure or occasion to cultivate his own lands. Com. Dig. Disim. E. 7. 1 Woodd. 190.

Note 11, page 31, line 20, words *de non decimando*.—Posterior usage is evidence of the antecedent, and has always been allowed so in cases of this nature; for what other evidence can be had? Ld. Hardw. 2 Atk. 137.

Note 12, page 32, line 22, words *formerly held them*.—This provision is peculiar to that statute, and therefore all the lands belonging to the lesser monasteries, dissolved by the 27 Hen. VIII. c. 28. are now liable to pay tithe. Com. Dig. Disim. E. 7.

Note 13, page 34, line 21, words *all the year*.—It seems to be fully established, that upon all commons appendant or appurtenant to land, the owner of the land can only turn out his own cattle, and such as are *levant and couchant* upon the land, to which the right of common is annexed. 8 tin. 137. and see the cases referred to in 2 Woodd. 77. and Com. Dig. Common.

Note 14, page 34, line 28, word "*improving*."—But the lord cannot approve where the commoners have a right of turbury, piscary, of digging sand or of taking any species of estovers upon the common. 2 Inst. 87. 2 T. R. 391. It has been determined, that any

person, besides the lord of the manor, who is seised in fee of part of a waste, may approve, provided he leaves a sufficiency of common, for the tenants of the manor. 4 T. R. 445.

Note 15, page 36, line 23, words *with the Roman*.—Lord Mansfield took notice of the inaccuracy of this passage, in the case of Taylor v. Whitehead, Doug. 716. in which it was determined, that if a man has a right of way over another's land, unless the owner of the land is bound by prescription or his own grant to repair the way, he cannot justify going over the adjoining land, when the way is impassable by the overflowing of a river; but if public highways are foundous, passengers are justified, from principles of convenience and necessity, in turning out upon the land near the road.

Note 16, page 37, line 10, words *detriment of the public*.—If two offices are incompatible, by the acceptance of the latter, the first is relinquished and vacant, even if it should be a superior office. 2 H. R. 81.

Note 17, page 38, line 16, words *not to the forest locus*.—The king, before the *charta de foresta*, could have made a forest wherever he pleased over the lands of his subjects; but after the boundaries of the district fixed upon were marked out and proclaimed by the sheriff, it was only a chase till proper officers were appointed, when it became a forest, and under the jurisdiction of the chief justice in eyre. *Manw. tit. Forest. pl. 7*. A forest is not necessarily a chase in the hands of a subject; for it may be granted by the king, subject to the justice-seat and the forest laws, as the duke of Lancaster, and duke of Norfolk, and many other noblemen have had forests subject to the forest laws; but if the jurisdiction is not added in the grant, it becomes a chase, and trespassers in it are punishable only by the common law. *Ib. pl. 67. et seq. 4 Inst. 314*.

Note 18, page 38, line 33, words *park or chase*.—See this controverted in a note to page 423, *post*.

Note 19, page 39, (to note) *mallards and herons*.—Upon the forest laws I should consider Manwood's higher authority than Sir Edward Coke.

Manwood informs us, that a forest is not a privileged place for all manner of beasts or fowls, but only for beasts of forest, chase, or warren, and no other; that is, for the hart, the hind, and the hare, which are beasts of the forest; the buck, the doe, the fox, which are beasts of the chase; the hare, the coney, the pheasant, and the partridge, which are beasts and fowls of warren; and no other. The game of free-warren are such as may be taken with long-winged hawks. *For. pl. 20. Warren*.

Note 20, page 39, line 15, words *free-warren*.—But the owner of a free-warren neither kept nor killed the game for the use of the king: the doctrine which the learned Judge frequently repeats, that no one by the common law can justify sporting upon his own ground, is controverted at large by the Editor in a note to page 423, *post*.

Note 21, page 39, line 23, words *another's ground*.—Any one may now lease or convey his land, and reserve to himself the right of entering to kill game without being subject to be sued as a trespasser; but the right of free-warren can only exist by the king's grant, or by prescription, from which such a grant is presumed. *Manw. Warren. Foreff.* pl. 43.

Note 22, page 40, line 4, words *not requisite*.—A subject may have, by prescription, a right to a several fishery in an arm of the sea. 4 T. R. 437.

Note 23, page 40.—See note on *Co. Litt.* 122.—The alterations made in the text in consequence of the observations of Mr. Hargrave upon this subject, prove the candour and liberality of the learned Judge, and his readiness to correct any inaccuracy, when it was pointed out to him.

Note 24, page 41, line 12, words *merely personal*.—See annuities for lives, page 465, *post*.

Note 25, page 42, line 7, words *action of debt*.—There can be no doubt but the lessee of tithes, an advowson, or any incorporeal hereditament, would be liable to an action of debt for the rent agreed upon. See 2 Woodd. 69, where this passage is taken notice of.

Note 26, page 42, line 33, words *payment of it*.—A clear rent-charge must be free from the land-tax. Doug. 602.

Note 27, page 43, line 15, words *life or years*.—Mr. Hargrave is of opinion, that the quantum of the rent is not essential to create a fee-farm. *Harg. Co. Litt.* 143, b. n. 5; where he differs from Mr. Douglas, who had thought that a fee-farm was not necessarily a rent-charge, but might also be a rent-fee. Doug. 605.

Note 28, page 43, line 21, words *upon lease*.—That is, for such as had been paid for three years, within 20 years before the passing that act, or for such as have been since created. 4 Geo. II. c. 28. s. 5. Doug. 602.

Note 29, page 43, line 29, words *till midnight*.—If the lessor dies before sun-set on the day upon which the rent is demandable, it is clearly settled that the rent unpaid is due to his heir, and not to his executor; but if he dies after sun-set and before midnight, it seems to be the better opinion, that it shall go to the executor, and not to the heir. 1 P. Wms. 178.

CHAPTER THE FOURTH.

Of the Feudal System.

Note 1, page 44, line 2, words *of this kingdom*.—An intimate acquaintance with the feudal system is absolutely necessary to the attainment of a comprehensive knowledge of the first principles and progress of our constitution. And this subject, in my opinion, might, with great propriety, have preceded the chapter upon parliament. The authority of lord Coke, upon constitutional questions, is greatly diminished by his neglect of the study of the feudal law.

which Sir Henry Spelman, who well knew its value and importance, feelingly laments: "I do marvel many times, that my lord Coke, "adorning our law with so many flowers of antiquity and foreign "learning, hath not turned into this field, from whence so many "roots of our law have, of old, been taken and transplanted." *Spelm. Orig. of Terms*, c. viii.

Note 2, page 45.—See note *property of the scoldist*.—This is the same as *ell bood* in English, and is suggested as the derivation of *allodium* in *Wool. Religion of Nat. del.* p. 136.

Dr. Robertson adopts the derivation of *allodium* from *an* and *lot*, or allotment, the mode of dividing what was not granted as stipendiary property; and he relates the memorable story of the fierce foldier who refused to grant a sacred vase to his general Clovis, the founder of the French monarchy, who wishes to return it at the request of the bishop to the church from which it had been taken as spoil, by striking it violently with his battle-axe, and declaring "that you should have nothing but that to which the lot gives you a right!" *Hist. of Gb. V.* 1 vol. notes 7 & 8.

Note 3, page 53, line 21, words *slave or bondman*.—Nothing, I think, proves more strongly the detestation in which the people of this country held the feudal oppressions, than that the word *vassal*, which once signified a feudal tenant or grantee of land, is now synonymous to slave; and that the word *villain*, which once meant only an innocent inoffensive bondman, has kept its relative distance, and denotes a person destitute of every moral and honourable principle, and is become one of the most opprobrious terms in the English language.

CHAPTER THE FIFTH.

Of the ancient English Tenures.

Note 1, page 62, line 31, word *annum*.—Mr. Selden contends, that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant, upon the condition of having the service of one knight. *Tit. of Hen. 2. c. 5. f. 17 & 26.* This is more probable; besides, it cannot be supposed, that the same quantity of land was every where of the same value.

Note 2, page 68, line 2, words *perform them himself*.—If an infant tenant by knight's service was created a knight, the king was no longer intitled to the wardship of his person, nor to the value of his marriage. Sir John Radcliff's case, *Plow. 267.* And the reason there assigned is, that "when he is made a knight by the king, who "is the chief captain of all chivalry, or by some other great captain "assigned by the king for that purpose, he is thereby allowed and "admitted to be able to perform knight's service; and then his "body ought not to be in ward, because his imbecility ceases, and "cessante causa, cessabit effectus."

Note 3, page 69, line 25, words *vassals to be knighted*.—I do not find that this prerogative was confined to the king's tenants; lord

Coke does not make that distinction in his commentary on the *stat. de milit.* 2 Inst. 593. Nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. VI. and queen Elizabeth; which see in 15 *Rym. Foed.* 124 and 493. See 16 *Car. I. c.* 20. 2 *Rushw.* 70; and 1 vol. p. 404.

Note 4, page 70, line 19, words *valorem maritagii*.—That is, after a suitable match had been tendered by the lord; but female heirs were not subject to the *duplex valor maritagii*. Co. Litt. 82. b.

Note 5, page 71, line 26, words *any other law*.—What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following instances collected among others by lord Lyttleton, Hist. Hen. II. 2 vol. 296.

"John earl of Lincoln gave Henry the third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matilda his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honourable. For as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferrable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." Co. Litt. 88. n. 11.

One cannot read this without astonishment, that such should continue to be the condition of this country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable æra in the history of our law and liberty.

Note 6, page 73, line 19, words *of the last century*.—I do not know that we are any where told what proportion, in quantity, the military tenure bore to the socage tenure.

Note 7, page 74, line 19, words *denomination for money*.—But Lyttleton, Coke, and Bracton, render it the service of the shield, i. e. of arms, being a compensation for actual service. Co. Litt. 68. b.

Note 8, page 78, line 4, word *away* — Both Mr. Madox and Mr. Hargrave have taken notice of this inaccuracy in the title and the body of the act, viz. of taking away tenures *in capite*; (*Mad. Bar. Aug.* 238. *Co. Litt.* 108. n. 5.) for tenure *in capite* signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or socage tenure. The same incorrect language was held by the speaker of the house of commons in his pedantic address to the throne upon presenting this bill. “Royal sir, your tenures *in capite* are not only turned “into a tenure in socage, (though that alone will forever give your “majesty a just right and title to the labour of our ploughs, and the “sweat of our brows,) but they are likewise turned into a tenure “*in corde*. What your majesty had before in your court of wards, “you will be sure to find it hereafter in the exchequer of your “people’s hearts.” *Journ. Dom. Proc.* 11 vol. 234.

CHAPTER THE SIXTH.

Of the modern English Tenures.

Note 1, page 81, line 11, words *Littleton himself*. — The learned Judge has done Mr. Somner the honour of adopting his derivation of *socage*, which Mr. Somner himself boasts of as a new discovery with no little pride and exultation, as appears from the following sentence: *Derivatio forte, hæc nova et nostratibus adhuc inaudita, qui, à soc quatenus vel aratrum vel saltem vemerem signat, vocem derivare sutaunt. Quam male tamen, eorum veniâ, fusius a me jam monitum in tractatu de gavelkind, cap. 4.* *Somn. Gloss. Socæ.* But notwithstanding this unbecoming derivation has found an able defender in the learned Commentator, the Editor is obliged to prefer the old derivation for the following reasons: — Our most ancient writers derive it from *soca* or *soccus*, a plough; and *soca*, in some parts of the north of England, is the common name for a plough share to this day. The following description of *socage* is given by Bracton; *dici poterit socagium à socco, et inde tenentes socmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et maritagia ad propinquiores parentes jure sanguinis pertinebant.* (C. 35.) This is not only adopted by Littleton and lord Coke, (*Co. Litt.* 86.) who say, that *socagium est servitium socæ*, which is also the interpretation given by Ducange, (*voc. Soc.*) but sir Henry Spelman, whose authority is high in feudal antiquities, testifies, that *feudum ignobile, plebeium vulgare Gall. fief roturier nobili opponitur, et propriè dicimus, quod ignobilibus et rusticis competit, nullo feudali privilegio ornatum; nos socagium dicimus.* *Gloss. voc. Feod.* And *socagium* he explains by *Gall. roture, fief roturier. Heretages en roture.* (Ib. *voc. Soc.*)

In a law of Edward the Confessor, the sokeman and villain are classed together: *Manbote de villano et sokeman xii. vnos, de liberis autem hominibus iii. marcus.* (C. 12.) If we consider the nature of socage tenure, we shall see no reason why it should have the pre-eminence of the appellation of a privileged possession.

The services of military tenure were not left, as suggested by the learned Judge in the preceding page, to the arbitrary calls of the lord, for though it was uncertain when the king would go to war, yet the tenant was certain that he could only be compelled to serve forty days in the year; the service therefore was as certain in its extent as that of socage; and the sokeman likewise could not know beforehand when he would be called upon to plough the land, or to perform other servile offices, for the lord. The *milites* are every where distinguished from the *sokemanni*, and the wisdom of the feudal polity appears in no view more strongly than in this; viz. that whilst it secured a powerful army of warriors, it was not unprovided of the culture of the lands, and the domestic concern of the country. But honour was the invigorating principle of that system, and it cannot be imagined that those who never grasped a sword, nor buckled on a coat of mail, should enjoy privileges and distinctions denied to the barons and milites, the companions of their sovereign. The sokemanni were indebted only to their own meanness and insignificance for their peculiar immunities. The king or lord had the profits of the military tenant's estate, during his nonage, in order to retain a substitute with accoutrements, and in a state suitable to the condition of his tenant; and at the same time he took care, that the minor was instructed in the martial accomplishments of the age. But they disdained to superintend the education of the sokemanni; and as they had nothing to apprehend from their opposition, and could expect no accession of strength from their connexions, their marriages therefore were an object of indifference to them. Hence when the age of chivalry was gone, and nothing but its slavery remained, by no uncommon vicissitude in the affairs of men, the sokemanni derived from their obscurity that independence and liberty, which they have transmitted to posterity, and which we are now proud to inherit.

Note 2, page 88, line 26, words *age of twenty-one*.—See 1 Vol. 462.

Note 3, page 93, (see note) *Bracton*, l. 4. tr. 1. c. 28.—This is an eloquent description of slavery. Villeins were not protected by *magna charta*; *nullus liber homo capiatur vel imprisonetur*, &c. was cautiously expressed to exclude the poor villein; for as lord Coke tells us, the lord may beat his villein, and if it be without cause, he cannot have any remedy. What a degraded condition for a being endued with reason!

Note 4, page 95, line 36, words *at the lord's will*.—Lord Loughborough is inclined to question this origin of copyholds. "I cannot help doubting (observes that learned lord) whether this deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that in those parts of Germany, from whence the Saxons migrated into England, there exists, at this day, a species of tenure exactly the same with our copyhold estates; and there exists likewise at this day, a complete state of villenage; so that both stand together, and are not one tenure growing out of another, and by degrees assuming its place, &c. &c. What I

"have stated, I found in a very accurate treatise of German law by Selchow, one of the professors of the university of Göttingen, entitled, *Elementa Juris privati Germanici*. This seems sufficient to negative the idea, that copyholders sprang out of villeins. In England, villenage has ceased, and copyholds remain; but here, as in other countries, they both prevailed at the same time." Doug. 698.

Note 5, page 96, line 23, words *kept their villeins still*.—The last claim of villenage, which we find recorded in our courts, was in the 15th of Ja. I. Noy, 27. 11 Harg. St. Tr. 342.

Note 6, page 98, line 17, words *value of the estate*.—It is now established as an universal rule, that, where the fine upon the descent or alienation of a copyhold is arbitrary, it cannot be more than two years improved value. In ascertaining the yearly value, the quit rents must be deducted, but not the land-tax. Doug. 697.

The fine may be recovered by the lord in an action of assumpsit. *Jb.* But he has no right to it till the admittance of the tenant. 2 T. R. 484.

Note 7, page 98, line 34, words *right dose*.—In an action of ejectment, it may be pleaded in abatement, that the lands are part of a manor which is held in ancient demesne; but such a plea must be sworn to, and is not favoured. 2 Burr. 1046.

CHAPTER THE SEVENTH.

Of Freehold Estates, of Inheritance.

Note 1, page 104, line 22, words *freehold estates*.—A freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from, real property of free tenure; that is, now, of all which is not copyhold. And the learned Judge has elsewhere informed us, that "tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free, being a separate and distinct inheritance from the lands themselves. And in this view they must be distinguished and excepted from other incorporeal hereditaments issuing out of land, as rents, &c. which, in general, will follow the nature of their principal, and cannot be freehold, unless the stock, from which they spring, be freehold also." 1 Bl. Tracts, 116.

Note 2, page 107, line 22, words *life of Richard*.—The inheritance or remainder in such a case has been said to be in abeyance, or *in nubibus*, or *in gremio legis*; but Mr. Fearne, with great ability and learning, has exposed the futility of these expressions, and the erroneous ideas which have been conveyed by them. Mr. Fearne produces authorities, which prove beyond controversy, "that where a remainder of inheritance is limited in contingency by way of use, or by devise, the inheritance in the mean time, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of

"the testator, until the contingency happens to take it out of them."
Fearne, Cont. Rem. 513. 4th edition.

But although, as Mr. Fearne observes, "different opinions have prevailed in respect to the admission of this doctrine in conveyances at common law," (*ib.* 526.) yet he adduces arguments and authorities, which render the doctrine as unquestionable in this case as in the two former of *wifes* and *devises*. If therefore in the instance put by the learned Judge, John should determine his estate, either by his death, or by a feoffment in fee, which amounts to a forfeiture, in the life-time of Richard, under which circumstances the remainder never could vest in the heirs of Richard; in that case, the grantor or his heir may enter and resume the estate.

Note 3, page 110, line 29, words *in the successor*.—Mr. Fearne having attacked with so much success the doctrine of abeyance, the Editor may venture to observe, with respect to the two last instances, though they are collected from the text of Littleton, that there hardly seems any necessity to resort to abeyance, or to the *clouds*, to explain the residence of the inheritance, or of the freehold. In the first case, the whole fee-simple is conveyed to a sole corporation, the parson and his successors; but if any interest is not conveyed, it still remains, as in the former note, in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. See 1 vol. 511. And in the second case, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for after induction he can recover all the rights of the church, which accrued from the death of the predecessor.

Note 4, page 108, line 24, words *intended any more*.—But it is not necessary to use any words of perpetuity in a devise, in order to give a fee-simple, where it appears to be the intention of the testator to dispose of all his interest in an estate, and that is implied from the word estate alone; as if a testator gives to Richard his estate or *estate in* or *at* Dale, though neither heirs, assigns, or any other word is annexed to Richard's name, yet he takes an estate in fee-simple. 1 T. R. 411. 2 T. R. 656. So also where lands are given to Richard charged with the payment of a specific sum, and which is not to be raised out of the rents and profits, such a devise without words of perpetuity will carry a fee-simple; for otherwise the devisee might be a loser by dying before he was repaid the sum charged upon the estate. *Hargr. Co. Litt.* 9. b.

Note 5, page 111, (last line) words *the common law*.—See page 116, *post*.

Note 6, page 112, (see note) words *were cut off*.—Or is it not rather called so because it is a part cut out of the whole?

Note 7, page 113, line 19, word *reversioner*.—If an annuity is granted out of personal property to a man and the heirs of his body, it is a fee-conditional at common law, and there can be no

remainder or further limitation of it ; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the extinction of his issue. 2 *Ves.* 170. 1 *Bro.* 325.

But out of a term for years, or any personal chattel, except in the instance of an annuity, neither a fee-conditional nor an estate-tail can be created ; for if they are granted or devised by such words as would convey an estate tail in real property, the grantee or devisee has the entire and absolute interest without having issue ; and as soon as such an interest is vested in any one, all subsequent limitations of consequence become null and void. 1 *Bro.* 274. *Harg. Co. Litt.* 20. *Fearne*, 345. 3d. ed.

Note 8, page 113, line 22, words *de donis*.—See page 263. *post*.

Note 9, page 113, line 28, words *the lord's will*.—See page 375. *post*.

Note 10, page 115, line 15, words *modes of expression*.—Or to a man and his children, if he has no children at the time of the devise ; (6 *Co.* 17.) or to a man and his posterity ; (*H. Bl.* 447.) or by any other words, which shew an intention to restrain the inheritance to the descendants of the devisee. See 385. *post*.

Note 11, page 118, line 10, words *issue in tail*.—See page 323. *post*.

CHAPTER THE EIGHTH.

Of Freeholds not of Inheritance.

Note 1, page 122, line 16, words *to the inheritance*.—See p. 287. *post*, in what cases the tenant for life may cut down timber, and commit what in law is called waste.

Note 2, page 123, line 30, words 28 *Hen.* 8. c. 2.—That statute enables an incumbent to bequeath by will; the corn and grain growing upon the glebe-land.

Note 3, page 125, line 32, words *punishable for waste, &c.*—But although he is not punishable if he cuts down trees, yet they are not his property, but will belong to the first person living at the time when they are cut, who has an estate of inheritance. *Harg. Co. Litt.* 27. b. 3 *P. Wms.* 240.

Note 4, page 126, line 23, words *belonging to this island*.—I should rather think with Mr. Wooddeson, that this estate took its name from its peculiarity to England ; and that it was afterwards introduced into Scotland and Ireland. 2 *Woodd.* 18. Tenant by the *courtesy* of England, perhaps originally signified nothing more than tenant by the courts of England ; as in Latin he is called *tenens per legem Angliæ*. See *stat. pro tenantibus per legem Angliæ*. App. to Ruff. 29.

Note 5, page 127, line 1, words *maintain it*.—And this estate seems founded upon the natural and rational principle, that it is fitter that the son should be in a state of dependence upon the father, than the father upon the son,

Note 6, page 127, line 31, words *the courtsey*.—See this doubted in *Harg. Co. Litt.* 30.

Note 7, page 128, line 7, words *having any issue*.—But a tenant by courtsey of gavelkind lands has only a moiety of the wife's estate, which he loses by a second marriage. *Robin. Gavell. b. 2. c. 1.*

Note 8, page 128, line 22, words *heir to these lands*.—The issue in this case must be heir to the lands, though he is not heir to his mother; but he will inherit them by an immediate descent from the person last seized.

Note 9, page 130, line 20, words *reconciled to her*.—And in a case where John de Camoys had assigned his wife, by deed, to sir William Paynel, knight; which lord Coke calls *confectio mirabilis et inaudita*, it was decided in parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. *2 Inst.* 435.

Note 10, page 131, line 11, words *et virum sustinere*.—Lord Coke informs us, that "if the wife be past the age of nine years at the time of her husband's death, she shall be endowed of what age soever her husband be; albeit he were but four years old." *Quia "junior non potest dotem promereri, et virum sustinere."* This we are told by that grave and reverend judge without any remark of surprise, or reprobation. But it confirms the observation of Montesquieu in the Spirit of Laws, b. 26. c. 3. "There has been (says he) much talk of a law in England, which permitted girls seven years old to choose a husband. This law was shocking two ways; it had no regard to the time when nature gives maturity to the understanding; nor to the time when she gives maturity to the body." It is abundantly clear both from our law and history, that formerly such early marriages were contracted as in the present times are neither attempted nor thought of.

This was probably owing to the right which the lord possessed of putting up to sale the marriage of his infant tenant. He, no doubt, took the first opportunity of prostituting the infant to his own interest, without any regard to age or inclinations. And thus what was so frequently practised and permitted by the law, would cease even in other instances to be considered with abhorrence. If the marriage of a female was delayed till she was sixteen, this benefit was entirely lost to the lord her guardian.

Even the 18 Eliz. c. 7. which makes it a capital crime to abuse a consenting female child under the age of ten years, seems to leave an exception for these marriages, by declaring only the carnal and unlawful knowledge of such woman-child to be a felony. Hence the abolition of the feudal wardships and marriage at the restoration may perhaps have contributed not less to the improvement of the morals than of the liberty of the people.

Note 11, page 132, line 23, words *liable to dower*.—It is now settled, that, although the husband may be tenant by the courtsey of a trust estate of inheritance, the wife is not entitled to dower cut

of such an estate: 3 P. Wms. 229. The reason assigned why the wife has not dower out of a trust estate is, that she was not endowed of a use at common law.

And, from analogy to trusts it has been determined, that a wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband previous to the marriage. 1 Bro. 326.

Note 12, page 138, line 8, words *expressed to be*.—Or it may be averred to be, 4 Rep. 3. An assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed. And the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was traversable. Owen, 33.

Note 13, page 138, line 15, word *coverture*.—And where a devise is expressed to be given in lieu and satisfaction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. Harg. Co. Litt. 36. b.

Note 14, page 138, line 19, words *common law*.—It has been determined, that if a woman, who is under age at the time of marriage, agrees to a jointure and settlement in bar of her dower, and her distributive share of her husband's personal property, in case he dies intestate, she cannot afterwards waive it; but is as much bound, as if she were of age at the time of marriage. Lord Northington had decreed the contrary; but his decree was upon both points reversed. Drury v. Drury. 4 Brown's P. C. 570.

Note 15, page 139, (last line) words *species of onry*.—A jointure is not forfeited by the adultery of the wife, as dower is; and the court of chancery will decree against the husband a performance of marriage articles, though he alleges and proves that his wife lives separate from him in adultery. Con's P. Wms. 277.

CHAPTER THE NINTH.

Of Efforts to obtain Freshhold.

Note 1, page 141, line 23, words *one solar revolution*.—In bills of exchange and promissory notes a month is always a calendar month; as if a bill or note is dated on the 10th of January, and made payable one month after date, it is due (the three days of grace being included) on the 13th of February.

The six months in the cases of *lapse* and *quare impedit*, are also calendar months. 6 Co. 61.

It is somewhat remarkable, that the difference between six calendar months and half a year, does not seem to have been considered by legal writers. Lord Coke says, half a year consists of 182 days. 1 Inst. 135. But six calendar months will be two or three days less or more than half a year, accordingly as February is reckoned, or not, one of the six. Lord Coke, in his report of Carelby's case, clearly considers the *tempus semestre* to be six calendar months; (6 Co. 61.) yet sir George Croke, in his report of that case, states it

as confidently to consist of 182 days; and in neither report is the difference taken notice of.

From the cases in 3 *Will.* 21. and 1 *T. R.* 159. it appears that a notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar months, though the computation by the latter would be more simple and convenient; and that was understood to be the proper notice by the court of common pleas in 2 *Bl. Rep.* 1224.

Note 2, page 141, line 29, words *day commences*.—See 4 *T. R.* 170. where there was a difference of opinion in the court upon the question, whether a bill of exchange could be protested for non-payment on the same day that it was due, or the acceptor had the whole of the day to discharge it in?

Note 3, page 147, line 13, words *six months*.—See page 140. *ante*, note 1. The learned Judge, in the text, tells us, the notice must be *six months*, and in the note *half a year*; but in addition to the authorities referred to by the Editor in note 1, it is *demy an*, or half a year, in the 13 *Hen. VIII.* 25. The notice must be to quit at the end of the year: 1 *T. R.* 159. The time specified in the notice will be supposed to be the end of the year, unless the contrary is shewn. *Id.* If the notice is not good for one year, it is not good for the next, it being supposed that the landlord has waived it. 2 *Bro.* 161. The defect of notice cannot be set up by a tenant who controverts the title of the landlord. *Id.*

If the landlord gives notice to quit, and afterwards receives rent for the time subsequent to the end of the year, it is a question for the jury to determine, whether it was accepted or not with an intention to waive the notice. *Cowp.* 243. But it has been determined, that a distress for such rent will not admit of any other explanation, and is an unequivocal waiver of the notice. *H. Bl. Rep.* 311.

Note 4, page 150, line 23, words *tenant at sufferance*.—A lease at will being now considered a lease from year to year, which cannot be vacated without half a year's notice to quit, upon the death of the lessor the tenant cannot be ejected without half a year's notice from his heir. 2 *T. R.* 159. And it has also been decided, that it is necessary to give that notice to the personal representative of the lessee. 3 *Will.* 25.

Note 5, page 151, (last line) words *owner of the tenement*.—Where a tenant has a lease for a term certain, and holds over after the expiration of it, it is not necessary for the landlord to give him any notice to quit, in order to recover possession by ejectment. 1 *T. R.* 53: 162. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at sufferance into a tenancy from year to year. The notice by 4 *Geor. II.* c. 28. may be given previous to the end of the term. *Bl. Rep.* 1075. But I should think, that it may also be given afterwards, though the double value could only be recovered from the delivery of the notice, and demand of possession.

The notice by the landlord must be in writing; but that by the tenant, under 11 Geo. II. c. 19. may be by parole. 3 Burr. 1603. The double value can only be recovered by action of debt; but the double rent may be recovered by distress or otherwise, like single rent. 1 Bl. 535. No length of time is necessary to the validity of these notices under the statutes, to entitle the landlord to double value, or double rent.

CHAPTER THE TENTH.

Of Estates upon Condition.

Note 1, page 159, line 6, words *his estate*.—In general if the mortgagee has been twenty years in possession, the court of chancery, in conformity to the time of bringing an ejectment, will not permit the mortgagor to redeem, unless during part of the time the mortgagor has been an infant or a married woman; or unless the mortgagee admits he holds the estate as a mortgage, or there is some other special circumstance, which forms an exception to the general rule. *Eq. Ca. Abr.* 313. 2 Bro. 329. Where two different estates are mortgaged by the owner to the same person, one cannot be redeemed without the other. *Amb.* 733.

Note 2, page 159, line 24, words *redemption whatsoever*.—By the 4 & 5 W. & M. if any person mortgages his estate, and does not previously inform the mortgagee in writing of a prior mortgage, or of any judgment or incumbrance, which he has voluntarily brought upon the estate, the mortgagee shall hold the estate as an absolute purchaser free from the equity redemption of the mortgagor.

Note 3, page 159, line 29, words *bring an ejectment*.—The mortgagee is not now obliged to bring an ejectment to recover the rents and profits of the estate, for it has been determined, that where there is a tenant in possession, by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him; and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. *Moss v. Gollimore*, Doug. 266. The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee; he has not even the estate of a tenant at will, for it is held he may be prevented from carrying away the emblements, or the crops which he himself has sown. *Id.*

Note 4, page 160, line 12, words *ancient law*.—It has been said by a learned judge to be an established rule of equity, that a second mortgagee, who has the title deeds without notice of any prior incumbrance, shall be preferred, because if a mortgagee lend money upon real property without taking the title deeds, he enables the mortgagor to commit a fraud. 1 T. R. 762. But lord Thurlow afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to postpone the first mortgagee; if it were so, there could be no such thing as a mortgage of a reversion; and he held that the second mortgagee in

possession of the title deeds, was preferred only in cases where the first had been guilty of fraud or of gross negligence. 2 Bro. 652.

But I should be inclined to think that fraud or gross negligence would be presumed, unless the mortgagee could shew that it was impossible for him to obtain the possession of the title deeds, or that he had used the due and necessary diligence for that purpose.

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security, to be certain that there is no prior mortgage upon the estate; for it has been long settled, that if a third mortgagee, who at the time of his mortgage had no notice of the second, purchases the first mortgage even pending a bill filed by the second to redeem the first, both the first and third mortgages shall be paid out of the estate, before any share of it can be appropriated to the second: the reason assigned is, that the third, by thus obtaining the legal estate, has both law and equity on his side, which supercede the equity of the second. And even lord Hale held it right, that the third should seize what he called the *tabula in naufragio*, a plank in the shipwreck, and thus leave the second to perish. But among mortgagees, where none has the legal estate, the rule in equity is, *qui prior est tempore, potior est jure*. 2 P. Wms. 491. 1 Bro. 63.

As this is the equity which is intelligible to ordinary understandings, if it were not presumptuous to reflect a censure upon a doctrine so long sanctioned by illustrious names, it might be observed that the equity of the second ought to have outweighed both the law and equity of the third; for it can hardly be reconciled with substantial justice, that the third by any contrivance or combination should be permitted to run away with the whole estate, and to leave nothing to the second, who had fairly and honestly advanced his property. But this, if wrong, can only be corrected by the authority of the legislature.

Note 5, page 161, line 9, words *on the record*.—These estates are sometimes referred to in argument, but are now unknown in practice.

CHAPTER THE ELEVENTH.

Of the Estates in Possession, Remainder, and Reversion.

Note 11, page 169, line 32, word *womb*.—A father had devised an estate to his son for life, with a remainder to the first and other sons of the son in tail; the son died, leaving his wife pregnant, who was afterwards delivered of a son: the courts of common pleas and king's bench held clearly, that the grandson not being born at the expiration of the estate for life, was not entitled to take it; but the lords, moved by the hardship of the case, reversed the judgments of the courts below, contrary to the opinions of all the judges. *Reeve v. Long*, 1 Salk. 227. But the house of commons in reproach of this assumption of legislative authority in the lords, immediately brought in the 10 & 11 W. III. which passed into statute. The statute only mentions marriage and other settlement

and it is probable, that devises were designedly omitted to be expressed from delicacy, and that the authority of the judgments of the peers might not be too openly impeached. As the statute says, the posthumous son in this case shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father, (3 *Atk.* 203.) which is different from the case of a descent devolved by the birth of a posthumous child. See 1 Vol. p. 130. note 9.

Note 2, page 171, line 23, words *remainders vest*.—But a conveyance of a greater estate than he has by bargain and sale, or by lease and release, is no forfeiture, and will not defeat a contingent remainder. 2 *Leo.* 60. 3 *Mod.* 151.

Note 3, page 172, line 13, words *general use*.—We have seen before, in chapter vii. that, in a grant of a fee-simple to A, it is necessary to give it to A and his heirs; of a fee-tail, to A and the heirs of his body; and that a grant to A, without any additional words, gives him only an estate for life. Hence the word *heirs* in the first case, and the words *heirs of the body* in the second, are said to be words of limitation, because they limit or describe what interest A takes by the grant, *viz.* in one case, a fee-simple, in the other, a fee-tail: and the heirs in both instances take no interest any farther than as the ancestor may permit the estate to descend to them. But if a remainder is granted, or estate devised to the heirs of A, where no estate of freehold is at the same time given to A, the heir of A cannot take by descent from A; but he takes by purchase, under the grant, in the same manner as if the estate had been given to him by his proper name. Here the word heirs is called a word of purchase. Having premised the distinction between words of limitation and words of purchase, I may observe, that the much-talked-of rule in *Shelley's case*, 1 *Co.* 104. is this, *viz.* "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately, to his heirs in fee or in tail, that all ways in such cases the heirs are words of limitation, and not words of purchase:" and the remainder is said to be executed in the ancestor, where there is no intermediate estate; or *vested*, when an estate for life or in tail intervenes.

As if an estate be given to A for life, and after his death, to the heirs of his body; this remainder is executed in A, or it unites with his estate for life; and the effect is the same as if the estate had at once been given to A and the heirs of his body; which expression limits an estate tail to A, and the issue have no indefeasible interest conveyed to them, but can only take by descent from A. So also if an estate be given to A for life, with remainder to B for life or in tail, remainder to the heirs, or the heirs of the body, of A—A takes an estate for life, in this case, with a vested remainder in fee or in tail; and his heir under this grant can only take by descent at his death. *Fearne*, 21. But when the estate for life, and the remainder in tail or in fee unite and coalesce, and heirs is a

word of limitation, the two estates must be created by the same instrument, and must be either both legal, or both trust estates, *Doug.* 490. 2 T. R. 444. The rule with regard to the execution or coalition of such estates seems now to be the same in equitable as in legal estates. 1 Bro. 206. And in all these cases where a person has an estate tail, or a vested remainder in tail, he can cut off the expectations or inheritance of his issue, by a fine, or a recovery. *Doug.* 323. In order, therefore, to secure a certain provision for children, the method was invented of granting the estate to the father for life, and, after his death, to his first and other sons in tail; for the words *son or daughter* were held to be words of purchase, and the remainder to them did not, like the remainder to *heirs*, unite with the prior estate of freehold. But if the son was unborn, the remainder was contingent, and might have been defeated by the alienation of the father by feoffment, fine, or recovery: to prevent this, it was necessary to interpose trustees, to whom the estate is given upon such a determination of the life-estate, and in whom it rests, till the contingent estate, if at all, comes into existence; and thus they are said to support and preserve the contingent remainders. This is called a *strict settlement*, and is the only mode (executory devises excepted) by which a certain and indefeasible provision can be secured to an unborn child. But in the case of articles or covenants before marriage, for making a settlement upon the husband and wife, and their offspring, if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation; and a court of equity will decree the articles to be executed in strict settlement. See *Fierne*, 124, and examples there cited. It being the great object of such settlements to secure fortunes for the issue of the marriage, it would be useless to give the parents an estate tail, of which they would almost immediately have the absolute disposal. And therefore the courts of equity will decree the estate to be settled upon the parent or parents for life: and upon the determination of that estate by forfeiture, to trustees to support contingent remainders for their lives; and after their decease, to the first and other sons successively in tail, with remainder to all the daughters in tail as tenants in common, with subsequent remainders or provisions according to the occasions and intentions of the parties. In these strict settlements, the estate is unalienable till the first son attains the age of 21, who, if his father is dead, has then, as tenant in tail, full power over the estate; or if his father is living, he then can bar his own issue by a fine, independent of the father. *Gruiſe*, 161. But the father, and the son at that age, can cut off all the subsequent limitations, and dispose of the estate in any manner they please by joining in a common recovery. This is the origin of the vulgar error, that a tenant of an estate-tail must have the consent of his eldest son to enable him to cut off the entail; for that is necessary where the father has only a life-estate, and his eldest son has the remainder in tail. But there

is no method whatever of securing an estate to the grandchildren of a person, who is without children at the time of the settlement; for the law will not permit a perpetuity; and lord Thurlow has defined a perpetuity to be "any extension of an estate beyond a life in being, and 21 years after." 2 Bro. 30. See n. 4. Hence, where in a settlement the father has a power to appoint an estate to or amongst his children, he cannot afterwards give this to his children in strict settlement, or give any of his sons an estate for life, with a remainder in tail to his eldest son; for if he could do this, a perpetuity would be created by the original settlement. 2 T. R. 241.

The student, who wishes to obtain a clear and comprehensive knowledge of this abstruse branch of legal learning, cannot bestow too great attention upon Mr. Fearn's Treatise upon Contingent Remainders and Executory Devises, where it is learnedly and perspicuously discussed and methodized. I have thought it proper to select and to subjoin here these important, though common, distinctions, as in innumerable instances, from the ignorance of the persons employed, family settlements, particularly in wills, have proved abortive, and the intentions of parents and testators have been unhappily disappointed.

Note 4, page 174, line 18, word *devise*.—This limit was taken from the time in which an estate may be rendered unalienable by a strict settlement. An executory devise to an unborn son of a man may be suspended a few months beyond the life of the father, and twenty-one years afterwards by a posthumous birth.

Note 5, page 175, line 7, words *first devise*.—It has long been fully settled that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of twenty-one; and that the limits of executory devises of real and personal property are precisely the same. *Fearn*, 320. It is very common to bequeath chattel interests to A and his issue, and if he dies without issue, to B. It seems now to be determined, that where the words are such as would have given A an estate-tail in real property, in personal property the subsequent limitations are void, and A has the absolute interest: but if it appears from any clause or circumstance in the will, that the testator intended to give it over only in case A had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See *Fearn*, 371. and cases referred to in 3 Cox's P. Wms. 262.

CHAPTER THE TWELFTH.

Of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common.

Note 1, page 182, line 22, words *remain to the survivor*.—And if a grant is made of a joint estate to husband and wife, and a third person, the husband and wife shall have one moiety, and the third

person the other moiety, in the same manner as if it had been granted only to two persons. So if the grant is to husband and wife and two others, the husband and wife take one third in joint-tenancy. *Litt.* § 291.

Note 2, page 183, line 30, words *joint-tenancy*.—This action is now perhaps never brought; but the practice is to apply to a court of equity to compel an account; which is also the jurisdiction generally resorted to, in order to obtain a partition between joint-tenants, parceners, and tenants in common. *Com. Dig. Chan.* 3. V. 6. & 4 *E. Mitf.* 109.

Note 3, page 184, (last line) words *can never die*.—But lord Coke says expressly, "there may be joint-tenants, tho' there be not equal benefit of survivorship; as if a man let lands to A and B during the life of A; if B die, A shall have all by survivorship; but if A die, B shall have nothing." *Co. Litt.* 181. The mutuality of survivorship does not therefore appear to be the reason why a corporation cannot be a joint-tenant with a private person; for two corporations cannot be joint-tenants together; but whenever a joint-estate is granted to them, they take as tenants in common. *Co. Litt.* 190. But there is no survivorship of a capital, or a stock in trade, among merchants and traders; for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *ius accrescendi inter mercatores pro beneficio commercii locum non habet*. *Co. Litt.* 182. See p. 402, *post*.

Note 4, page 186, line 5, word *vested*.—If a will is made by a joint-tenant of real property, devising his interest in the premises, and after the execution of the will there is a partition of the estate, the testator's share cannot pass by the devise, unless there is a republication of the will subsequent to the partition. 3 *Burr.* 1423.

Note 5, page 189, line 4, words *but in common*.—And also all personal property. See page 403, *post*.

Note 6, page 189, line 20, word *younger*.—It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after her death. *Harg. Co. Litt.* 166. But it was expressly determined in favour of such a grantee in 1 *Ves.* 340.

Note 7, page 189, (last line) word *severalty*.—Another, and the most usual, mode of compulsion is by a decree of a court of equity. See page 186. n. 2. *ante*.

Note 8, page 193, line 34, words *imperfectly expressed*.—In ancient times joint-tenancy was favoured by the courts of law, because it was more convenient to the lord and more consistent with feudal principles; but those reasons have long ceased, and a joint-tenancy is now every where regarded, as lord Cowper says it is in equity, as an odious thing. 1 *Salk.* 158. In wills the expressions *equally to be divided, share and share alike, respectively, between, and amongst*, have been held to create a tenancy in common. 2 *Atk.* 91. 4 *Bro.* 15. 1 *Cox's P. Wms.* 14. I should have little doubt but the same construction would now be put upon the word *severally*, which seems

peculiarly to denote separation or division. But those words are only evidence of intention, and will not create a tenancy in common, where the contrary from other parts of the will appears to be the manifest intention of the testator. 3 *Bro.* 215.

The words *equally to be divided* make a tenancy in common in surrenders of copyholds, and also in deeds, which derive their operation from the statute of uses. 1 *P. Wms.* 14. 1 *Wilf.* 341. 2 *Vesf.* 257. And though lord Hardwicke seems to be of opinion in 1 *Vesf.* 165. 2 *Vesf.* 257. that these words are not sufficient to create a tenancy in common, in common law conveyances, yet I am inclined to think, that in such a case, nothing but invincible authority would now induce the courts to adopt that opinion, and to decide in favour of a joint tenancy.

Note 9, page 194, line 21, words *against him*.—But adverse possession, or the uninterrupted receipt of the rents and profits, is now held to be evidence of an actual ouster. And where one tenant in common has been in undisturbed possession for twenty years, in an ejectment brought against him by the co-tenant, the jury will be directed to presume an actual ouster, and consequently to find a verdict for the defendant. *Cowp.* 217.

CHAPTER THE FOURTEENTH

Of Title by Descent.

Note 1, page 201, line 13, words *act or agreement*.—Purchase in law is used in contradistinction to descent, and is any other mode of acquiring real property, viz. by devise, and every species of gift, and grant; and as the land taken by purchase has very different inheritable qualities from land taken by descent, the distinction is important. See page 244. *post.*

Note 2, page 205, line 24, words *daily diminishing*.—To keep population without increase or diminution, each child must not produce two, but only one upon an average, that is, every one must leave another to supply his or her place: it is true then that every two must leave two; but every married couple must, upon an average, produce considerably more than two; for they must leave two to supply their own places, and also others to supply the great number of those who die without contributing to the stock of population. But if we suppose the number of the sexes equal; it is then true that each individual male, and individual female, must produce two upon an average; or we can say, that every woman that is born must, upon an average, bear two children; and consequently every married woman considerably more.

Note 3, page 206, (see note) words *quadruple ratio*.—The learned Judge's reasoning is just and correct; and that the collateral relations are quadrupled in each generation may be thus demonstrated. As we are supposed, upon an average, to have one brother or sister,

the two children by the father's brother or sister will make two cousins, and the mother's brother or sister will produce two more, in all, four. How the same reason, my father and mother must each have had four cousins, and their children are my second cousins; so I have eight second cousins by my father, and eight by my mother; together sixteen. And thus, again, I shall have 32 third-cousins on my father's side, and 32 on my mother's, in all, 64. Hence it follows that each number must be multiplied by twice two or four.

This immense increase of the numbers depends upon the supposition that no one marries a relation; but to avoid such a match, it will very soon be necessary to leave the kingdom. How these two tables of consanguinity may be reduced by the intermarriage of relations, will appear from the following simple case: If two men and two women were put upon an uninhabited island, and became two married couple, if they had only two children each, a male and female, who intermarried, and in like manner produced two children, who are thus continued *ad infinitum*; it is clear, that there would never be more than four persons in each generation; and if the parents lived to see their great-grandchildren, the whole number would never be more than sixteen; and thus the families might be perpetuated without any incestuous connexion.

Note 4, page 217, (last line) word *nine*.—The difference of the computation by the civil and canon laws may be expressed shortly thus; the civilians take the sum of the degrees in both lines to the common ancestor; the canonists take only the number of degrees in the longest line. Hence when the canon law prohibits all marriages between persons related to each other within the seventh degree, this would restrain all marriages within the 14th degree of the civil law. In the 1 vol. 46L n. 2. it is observed, that all marriages are prohibited between persons who are related to each other within the third degree, according to the computation of the civil law. This affords a solution to the vulgar paradox, that first cousins may marry, and second cousins cannot. For first cousins and all cousins may marry by the civil law; and neither first nor second cousins can marry by the canon law. But all the prohibitions of the canon law might have been dispensed with. It is said, that the canon law computation has been adopted by the law of England; yet I do not know a single instance in which we have occasion to refer to it. But the civil law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares, of intestate personal property. See *p. 38, 508. 519.*

Note 5, page 208, (last line) words *posthumous son*.—But besides the case of a posthumous child, if lands are given to a son, who dies, leaving a sister his heir; if the parents have, at any distance of time afterwards, another son, this son shall devest the descent upon the sister, and take the estate as heir to his brother. *Co. Litt. 11. Doct. & Stud. 1 Dial. c. 7.* So the same estate may be frequently

devised by the subsequent birth of nearer presumptive heirs, before it fixes upon an heir apparent. As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister may enter, and who will again be deprived of the estate by the birth of a brother.

It seems to be determined, that every one has a right to retain the rents and profits, which accrued whilst he was thus legally possessed of the inheritance. *Harg. Co. Litt. 11. 2 Wils. 526.*

Note 6, page 209, (last line) words *facit stipitem*.—See examples of this, page 231, note, *post*.

Note 7, page 212, line 33, word *gravitation*.—However ingenious and satisfactory these reasons may appear, there is little consistency in the application of them; for if the father does not succeed to the estate, because it must be presumed that it has passed him in the course of descent, the same reason would prevent an elder brother from taking an estate by descent from the younger.

And if it does not pass to the father, lest the lord should have been attended by an aged decrepit feudatory, the same principle would be still stronger to exclude the father's eldest brother from the inheritance, who is now permitted to succeed to his nephew. The father may take his son's estate by an intermediate descent; for if the son has neither issue, nor brothers or sisters, the estate will descend to an uncle, or some collateral relation, to whom the father may be the next heir. But in some cases the father or mother may inherit immediately from a child. And this may happen when either the husband or wife is heir to the other. As if the husband is heir to the wife, and she dies seised of an estate, which descends to an only child, if that child dies without issue, the father will take the estate by an immediate descent, agreeably to the maxim, *que dicitur inheriter al pere, dicitur inheriter al filio*; yet in this case he does not inherit as father, but as a collateral kinsman. See such a case, 2 *P. Wins. 613*. The student must be careful to recollect that the rules of succession to intestate personal property are very different from these rules of descent of real property and hereditaments. For if a child dies intestate without wife or issue, his father will take the whole of his personal property; and if there be no father living, the mother will have an equal share with the brothers and sisters. See page 520. *post*.

Note 8, page 216, line 28, words *which of them be pleases*.—The king in the case of coparceners of a title of honour, may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity.

There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. *Harg. Co. Litt. 165.*

Lord Coke says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest *M.* Yet when the office of great chamberlain had descended to two sisters coheiresses of the duke of Ancaſter, one of whom was married to Peter Burrell, eſq. the judges gave it as their opinion in the houſe of lords, “ that the office belongs to both ſiſters ; that the husband “ of the eldeſt is not of right entitled to execute it ; and that both “ ſiſters may execute it by deputy, to be approved of by them ; “ ſuch deputy, not being of a degree inferior to a knight, and to be “ approved of by the king.” *Ib. et Journ. Dom. Proc.* May 25, 1781.

Note 9, page 220, line 18, words of *this family*.—To be of the blood of Geoffrey, is either to be immediately deſcended from him, or be deſcended from the ſame couple of common anceſtors. Two perſons are *conſanguinei* or are of the blood (that is, whole blood) of each other, who are deſcended from the ſame two anceſtors.

The heir and anceſtor muſt not only have two common anceſtors with the original purchaſer of the eſtate, but muſt have two common anceſtors with each other ; and therefore if the ſon purchaſes lands and dies without iſſue, and it deſcends to any heir on the part of the father, if the line of the father ſhould afterwards become extinct, it cannot paſs to the line of the mother. *Hale's Hiſt. C. L.* 246, 49 E. 3. 12. And for the ſame reaſon if it ſhould deſcend to the line of any female, it can never afterwards, upon failure of that line, be tranſmitted to the line of any other female, for according to the next rule, *viz.* the ſixth, the heir of the perſon laſt ſeiſed, muſt be a collateral kiſman of the whole blood.

Note 10, page 222, line 40, words *father's father*.—Hence the expreſſion *heir at law*, muſt always be uſed with a reference to a ſpecific eſtate ; for if an only child has taken by deſcent an eſtate from his father, and another from his mother, upon his death without iſſue, theſe eſtates will deſcend to two different perſons : ſo alſo if his two grandfathers and two grandmothers had each an eſtate, which deſcended to his father or mother, whom I ſuppoſe alſo to be only children, then, as before, theſe four eſtates will deſcend to four different heirs.

Note 11, page 224, line 7, words *jure representationis*.—This is only true in the paternal line ; for when the paternal and maternal lines are both admitted to the inheritance, the moſt remote collateral kiſman *ex parte paternâ*, will inherit before the neareſt *ex parte maternâ*. See p. 239. poſt.

Note 12, page 225, line 10, words *in infinitum*.—The Editor conceives that the true and only way of aſcertaining an heir at law in any line or branch, is by the representation of brothers or ſiſters in each generation, and that the introduction of the computation of kindred, either by the canon or civil law, into a treatiſe upon deſcents, may perplex and can never aſſiſt ; for if we refer this ſixth rule either to the civil or canon law, it will in many inſtances be erroneous. It is certain that a great-grandſon of the father's brother will inherit before a ſon of the grandfather's brother ; yet

the latter is the *next collateral kinsman* according to both the canon and civil computation ; for the former is in the fourth degree by the canon, and the sixth by the civil-law ; the latter is in the third by the canon, and the fifth by the civil ; but in the descent of real property the former must be preferred.

Note 13, page 228, line 3, words *actually seized*.—Of some inheritances there cannot be a seisin, or a *possessio fratris* ; as if the eldest brother dies before a presentation to an advowson, it will descend to the half-brother as heir to the person last seized, and not to the sister of the whole blood. 1 *Burn. Ec. 11*. So of reversions, remainders, and executory devises, there can be no seisin or *possessio fratris* ; and if they are reserved or granted to A and his heirs, he who is heir to A when they come into possession, is entitled to them by descent ; that is, that person who would have been heir to A, if A had lived so long, and had then died actually seized. 2 *Woodd. 256*. *Fearne, 448*. 2 *Willf. 29*.

Note 14, page 231, line 32, words *and a thrice*.—This ought to be twice ; for the half brother has one chance in two, the great uncle one in four ; the chance of the half brother is therefore twice better than that of the great uncle.

Note 15, page 233, line 22, words *auxiliary proof*.—And also in titles of honour half blood is no impediment to the descent ; but a title can only be transmitted to those who are descended from the first person ennobled. *Co. Litt. 15*. Half blood is also no obstruction in the succession to personal property. Page 509, *post*.

Note 16, page 236, line 31, words *me to determine*.—The learned Judge has exerted great ability and ingenuity in apologizing for the exclusion of the half blood. But whatever learning or eloquence may be displayed in its favour, I conceive nothing more in effect can be said for it than this, *viz.* that if the half blood was universally admitted to inherit, an estate might pass out of one family into another, between whom there was no union of blood. As where a son inherits an estate from his father, and his mother marries again and has a child by her second husband ; if this child could inherit from its half brother, it would acquire the estate of the first husband, to whom it is not related by blood ; and in order to avoid this inconvenience, the half blood is universally excluded. But surely nothing can be more cruel or contrary to our notions of propriety and consistency, than to give the estate to a distant relation or to the lord, in preference to a half brother, either when it has descended from the common parent, or when the half brother has himself acquired it.

A case was determined in the common pleas, a few years ago, under the following circumstances : A father died intestate leaving two daughters by his first wife, and his second wife pregnant, who was delivered of a son ; this infant lived only a few weeks ; and it was held, that as the mother had resided upon one of the father's estates, and had received rent for others after the father's death, she being the guardian in socage of the infant, this amounted to a

legal seisin in him, and of consequence his two sisters could not inherit, but the estate descended perhaps to a remote relation. 3 Will. 516. It is strange, that the discussion of that case did not procure a repeal of this law, which, the Editor cannot but think, is now totally inconsistent with the spirit and equity of our system of jurisprudence.

Note 17, page 240, (last line) words *John Stiles's decessor*.—Some professional gentlemen have not been satisfied with the learned Judge's arguments for his preference of n^o 10 to n^o 11; and an ingenious and able defence of the contrary doctrine has been published in answer to the learned Commentator by Mr. Osgood. The late learned Vinerian Professor has also declared, that he can "by no means accede to this opinion of Sir William Blackstone." 2 Woodd. 262. But from the consideration which I have bestowed upon the subject, I entirely concur with the learned Judge in giving a preference to n^o 10 before n^o 11. I am ready to admit, that some of the reasons adduced to maintain this doctrine, cannot be supported; but it does not follow that a doctrine is erroneous, because, out of a number of arguments in its favour, some of them are not unanswerable. But the principal grounds, which the Editor relies upon, are the following, viz. that the rule laid down by the learned Judge, is part of a consistent and certain system, by which we can immediately discover the heir to any inheritance; if we deviate from it, we are soon bewildered amidst uncertainty, inconsistency, and confusion; and when the law of descents is not called in to make a provision for a man's family and his near relations, in which both our reason and feelings, however we may wish to divide the inheritance into different portions, correspond with the law, it is then entirely *juris positivi*, and its only object is certainty; by which anxiety and litigation among a number of claimants of an intestate's estate, may be suppressed. But the law of descents is established beyond all possibility of controversy, till we search for an heir among great uncles, and second and third cousins. And between these, and still more remote relations, it is of infinitely greater concern to the public to fix a rule which can instantly inform us who is the heir, than to attend to any petty considerations of propriety, who ought to be the heir. It is fully settled, in the case of Clere and Brooke, Plowd. 450. that the brother of a grandmother, or his representative, shall be preferred in the descent of a newly purchased estate to a brother of a mother, or his representative; and this is a law which is certainly contrary to our natural wishes and sentiments; but it does little violence to our feelings to postpone the brother of a grandmother to the brother of a great-grandmother, and so in succession. If the grandmother is more worthy than the mother, because related by one male blood, and the mother by none, the great-grandmother, as is well observed by the editor of Plowden, ought to be still more worthy, being related by two male bloods. And whatever may be the principle, which operates so powerfully as to carry the estate past

the mother to the grandmother, ought to preserve its consistency, and to carry it also from the grandmother to the great-grandmother. But certainty is of much greater importance than consistency and symmetry; and if we have no other rule among heirs through females beyond the mother than proximity, what have we to assist and guide us, when there are descendants of a number of female ancestors or of ancestors through females of equal proximity? For if 10 is not to be preferred to 11, what principle can we find to determine between 10, 12, and 13? They have all an equal claim by proximity. The supporters of proximity will not be so bold as to say that they shall be coparceners, or that they shall run a race, and one shall gain the estate by occupancy. If we go a step higher, we shall find the descendants of the brothers of Anne Godfrey, William Smith, Jane King, Thomas Kempe, Sarah Browne, Charles Holland, and Mary Wilson, have all the same pretensions; and we may easily suppose also 15, 31, or any other number of claimants, without any clue whatever to determine the priority of their proximity. But according to the rule laid down by the learned Judge, no two cases can possibly be produced, but we can determine instantly which has the prior right by descent. Moreover a *feudum novum* is considered as a *feudum antiquum*, or a feud of indefinite antiquity; and if it had actually descended, which we may suppose, from Walter or George Stiles, then the heirs by their wives, and the wives of their descendants, would all have been entirely cut off; and therefore it is not unreasonable, or, at least, inconsistent with that supposition, that an heir on the part of a wife of a more remote ancestor of the Stileses, should be preferred to the heir on the part of a wife of a nearer ancestor.

If then the plan of descents, laid down by the learned Judge, be established, it may be explained by the scheme subjoined, which will determine the heir at law in all cases that can possibly be put or devised.

In tracing the heir downwards, in the descending line, no difficulty can ever occur. But in the scheme annexed, I suppose the propositus to die without issue, and without brothers or sisters, seized of an estate by purchase; and I suppose A, B, C, D, &c. to Z, to be his father, grandfather, &c. his lineal ancestors of the same name; and a, b, c, d—z, to be their wives respectively, who are not necessarily related to each other. To find then the heir of the propositus, we must inquire for the lineal heir or representative of the eldest brother of A the father; then for the representative of the second, third, &c. but if A had no brothers, then for his sisters and their representatives; if none can be found, we must in like manner have recourse to B, and so on to C; and if we find a representative of III, the eldest brother of C, he is the heir at law to the intestate, and will inherit before the representatives of the brothers of D, E, F, &c. And thus we are to go back through the lineal male ancestors of the intestate; but if in going up to Z, or to any indefinite distance, we can find no heir, issuing from the male

ancestors, we must then have recourse to the females ; but in this research, we must begin at the other end, and pursue a different direction. We must inquire first, whether *z*, the wife of one of the remotest male ancestors of the propositus, had a brother or sister leaving a representative ; for if so, he will be the heir of the propositus ; if we suppose 24, 6, 3 ; to be the respective brothers of the wives, then the descendants of 24 will inherit before those of 6 ; and for the same reason, those of 6 before those of 3. If *z* had no brother or sister leaving issue, but has collateral relations descended from her ancestors, one of those must be preferred to any heir on the part of *f*, *e*, *d*, &c. and to discover such an heir of *z*, we must put *z* in the place of the propositus, and inquire for the representatives of the brothers and sisters of her male ancestors, and then of their wives as before, and such an heir of *z* will inherit before the heir of *d*, *e*, *b*, and *a* ; and for the same reason their heirs respectively will have a preference as we come down to *a*. This table, the Editor conceives, is not difficult to be comprehended, and will determine immediately the priority of relations ever so remote, if their pedigrees can be traced.

It must be remembered, that if it is known that the estate has descended from *E* to the propositus, then none of the heirs of *e*, *d*, *c*, *b*, *a*, can ever be admitted ; and if it has descended from one of the wives, *vis.* *f*, then, as before, the heirs of *e*, *d*, *c*, *b*, *a*, are excluded, and also the collaterals of the male ancestors above *E* ; and if no collateral of *E*, *D*, &c. *f*'s descendants can be found, then to find her heir, she must be put in the place of the propositus in the table. The student must also observe, that if an estate, of which the propositus is the purchaser, should descend to a representative of a brother of *C* from the propositus, upon failure of that branch, it may afterwards pass to a representative of a brother of *F*, and so upwards in the male line ; but being once in the line of *VI*, the female branches, *f*, *e*, *d*, &c. are cut off, for they are not related by blood to *F* ; but, upon failure of that line, it is still transmissible to the lines of the females above ; for their collaterals would be related by blood, or will have a common ancestor with *F* ; and this is another strong argument in support of the doctrine, that the remoter females should be preferred to the nearer ; for this may be presumed to have been the progress of the estate in its descent from the propositus. When also it passes from the male into any female line, it cannot afterwards pass into any other female line, for they are not related to each other by blood. See n. 9. p. 223.

CHAPTER THE FIFTEENTH.

Of Title by Purchase, and first by Escheat.

Note. 1, page 241, line 26, words *shall take by purchase*.—A man having two daughters his heirs, devises his lands to them and their heirs, and dies. They shall take by purchase as joint-tenants : for

the estate of joint-tenants, and tenants in common, is different in its nature and quality from that of coparcenors. *Cro. Eliz.* 431.

Note 2, page 242, line 23, words *to a fee simple*.—See *ante*, p. 175. h. 3.

Note 3, page 246, line 31, word *granted*.—In the great case of *Burgess v. Wheate*, lord chancellor Northington determined contrary to the learned opinions of lord Mansfield and of Sir Thomas Clarke, master of the rolls, whose assistance he had requested, that where a *cestui que trust* dies without heirs, the trust does not escheat to the crown, so that the lands may be recovered in a court of equity by the king, but that the trustee shall hold them for his own benefit. *5 Bl. Rep.* 123.

Note 4, page 257, line 8, words *12 Wm. 3d. c. 4*.—This act was repealed by the 18 Geo. III. c. 6. so far as to permit such Roman catholics to inherit real property, as would take the oath of allegiance prescribed in the statute; which is the same oath that is directed to be taken by the 31 Geo. III. c. 32; which has repealed all the other odious restrictions upon those who profess the Roman catholic religion.

CHAPTER THE SIXTEENTH.

Of Title by Occupancy.

Note 1, page 259, line 23, words *special occupant*.—That is, where it is not granted to a man *and his heirs*.

Note 2, page 260, line 20, words *the first occupant*.—Lord keeper Harcourt has declared, there is no difference since the 29 Car. II. c. 3. between a grant of corporal and incorporeal hereditaments *pur autre vie*; for by that statute every estate *pur autre vie* is made deviseable, and if not devised, it shall be assets in the hands of the heir, if limited to the heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands; and the statute in the case of rents and other incorporeal hereditaments, does not enlarge, but only preserve the estate of the grantee. *P. Wms.* 264. In p. 113, *ante*, it is said, that an estate *pur autre vie* cannot be entailed; yet if such an estate be limited to A in tail, with remainder to B, these limitations are designations of the persons who shall take as special occupants; but any alienation of the *quasi* tenant in tail will bar the interest of him in remainder. See *Cox P. Wms.* 266.

CHAPTER THE EIGHTEENTH.

Of Title by Forfeiture.

Note 1, page 274, line 9, words *be void*.—Lord Hardwicke has declared, since this last mortmain act, that “there is no restriction whatsoever upon any one, from leaving a sum of money by will,

"or any other personal estate; to charitable uses; provided it be to
 "be continued as a personalty, and the executors or trustees are
 "not obliged, or under a necessity of laying it out in land, by vir-
 "tue of any direction of the testator for that purpose." 2 *Burn.*
Ec. 509. *tit. Mortm.*

Money left to repair parsonage houses, or to build upon land
 already in mortmain, is held not to be within the statute. 1 *Bro.* 444.
 But a legacy to the corporation of queen Anne's bounty, is void; as by
 the rules of the corporation it must be laid out in land. 1 *Bro.* 13.

Note 2, page 278, line 15, words *fellows or students*.—That is, of
 one moiety of the students in those colleges, in which there are no
 persons styled fellows. The advowsons annexed to headships are
 not to be computed. S. 5.

Note 3, page 276, line 29, words *the crown*.—If a right of lapse
 accrues to the bishop and he dies, or is translated before he avails
 himself of it, the right of presentation to the lapsed benefice does
 not pass to the king, like the vacant patronage of the see, but to
 the guardian of the spiritualities. *Gibb.* 770.

Note 4, page 278, line 10, words *by way of lapse*.—See 1 *Vol.* p.
 414, 415, notes 33 and 37.

Note 5, page 279, line 12, words *by gift or promise*.—The words
 of the statute are "for any sum of money, reward, gift, profit, or
 "benefit; or for any promise, agreement, grant, bond, covenant of
 "or for any sum of money, reward, gift, profit, or benefit."

Note 6, page 279, line 34, words *face of the statute*.—Lord Hard-
 wicke was of opinion, that the sale of an advowson, during a va-
 cancy, is not within the statute of simony, as the sale of the next
 presentation is; but it is void by the common law. *Amb.* 268.
 See p. 22. *ante*, n. 1.

Note 7, page 279, line 37, words *of queen Anne*.—It has been
 determined, that the purchase of an advowson in fee, when the
 incumbent was upon his death bed, without any privity of the
 clerk who was afterwards presented, was not simoniacal, and would
 not vacate the next presentation. 2 *Bl. Rep.* 1052.

Note 8, page 280, line 26, words *without proof*.—In the great
 case of the bishop of London *v.* Ffytche, it was determined by
 the house of lords, that a general bond of resignation is simoniacal
 and illegal. The circumstances of that case were briefly these:
 Mr. Ffytche the patron presented Mr. Eyre his clerk, to the bishop
 of London for institution. The bishop refused to admit the pre-
 sentation, because Mr. Eyre had given a general bond of resigna-
 tion; upon this, Mr. Ffytche brought a *quare impedit* against the
 bishop, to which the bishop pleaded, that the presentation was
 simoniacal and void, by reason of the bond of resignation; and
 to this plea Mr. Ffytche demurred. From a series of judicial
 decisions, the court of common pleas thought themselves bound to
 determine in his favour; and that judgment was affirmed by the
 court of king's bench; but these judgments were afterwards revers-

ed by the house of lords. The principal question was this, *viz.* whether such a bond was a *reward, gift, profit, or benefit*, to the patron under the 31 Eliz. c. 6 : If it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties, to be a *benefit* to the patron, that it is surprising that it should ever have been argued and decided that it was not a *benefit* within the meaning of the statute. Yet many learned men are dissatisfied with this determination of the lords, and are of opinion that their judgment would be different, if the question were brought before them a second time. But it is generally understood that the lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question which they have once decided, to be again debated in their house. With respect to the influence which the judgments of the inferior courts ought to have upon the house of lords, the Editor conceives a distinction may be suggested between cases arising merely upon the common law, and cases which depend upon the construction of a statute. A series of decisions in the courts are the best evidence we can have of the common law ; and the lords cannot find any adequate authority to oppose to these decisions, or which would justify their reversal : but upon the construction of a statute, where we have no reason to suspect any variation from the original, they seem as fully competent to determine a question, after any number of decisions upon it in the courts below, as after the first ; and the length of the series can operate no farther than as an object of general convenience.

In this view of the subject, it is not inconsistent to approve of the judgment of the lords in the case of resignation bonds ; and at the same time to condemn their judgment in the case of Reeve v. Long, (See p. 172, *ante*, n. 1.) where their humanity led them to relax the severity of the law. The case of the bishop of London v. Ffytche is reported at length in Cunningham's Law of Simony, p. 52.

But in a late case where a bond was given to resign a rectory, when the patron's son came of age, and before that time, to reside, and to keep the chancel and rectory in repair, as this case differed from the former, and it was understood that it was intended to carry it up to the house of lords, it was decided by the court of king's bench in favour of the bond, without an argument. 4 T. R. 359 & 78.

Note 9, page 281, line 4, words *the incumbent*.—In an action by the incumbent for the use and occupation of his glebe, the defendant cannot give in evidence the simoniacal presentation of the plaintiff. 5 T. R. 4. But it may be given in evidence by a defendant who is sued for the tithes. *Hob.* 168.

Note 10, page 281, line 21, words *is waste*.—The law upon this subject has been relaxed ; for during the term the tenant may take away chimney-pieces or wainscot, which he has put up ; but not after the term, for he would then be a trespasser. 1 Atk. 477. A fire-engine erected by tenant for life shall go to his executor. 3 Atk. 12. But the rule is different between the heir and executor, with

regard to fixtures upon the inheritance that descends to the heir. *H. Bl.* 258.

Note 11, page 281, line 27, words *accident of this kind*.—But if a lessee covenants to pay rent, and to repair, with an express exception of casualties by fire, he may be obliged to pay rent during the whole term, though the premises are burnt down by accident, and never rebuilt by the lessor. 1 *T. R.* 310.

Note 12, page 281, line 32, words *part of the inheritance*.—If during the estate of a mere tenant for life, timber is severed either by accident or by wrong, it belongs to the first person who has a vested estate of inheritance. But where there are intermediate contingent estates of inheritance, and the timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life has himself such estate and sells timber; in these cases the chancellor will order it to be preserved for him who has the first contingent estate of inheritance under the settlement. 3 *Con's P. Wms.* 267. 3 *Woodd.* 400.

Note 13, page 283, line 19, words *for waste committed*.—A tenant for life without impeachment of waste has as full power of cutting down timber, and of opening new mines for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others. 1 *T. R.* 56. *Harv. Co. Litt.* 220. But although such a tenant for life may commit waste for his own benefit, yet he may be restrained by an injunction out of the court of chancery for making *spoil and destruction* upon the estate. This distinction was first introduced in the case of lord Barnard, who was tenant for life without impeachment of waste, with remainder to his eldest son in tail; and having conceived a displeasure against his son, from motives of spleen, began to pull down the family mansion Raby Castle; but he was restrained by the chancellor, and ordered to repair it. 2 *Vern.* 738. Since that case, such a tenant has been restrained from cutting down avenues and ornamental timber in pleasure grounds, and also young trees not fit for timber. 1 *Bro.* 166. 3 *Bro.* 549. See also 3 *Woodd.* 339. *et seq.* where this subject is fully and learnedly treated.

Note 14, page 283, line 22, words *not within the statutes*.—See page 128 n. 3. *ante*.

Note 15, page 286, line 31, words *bankruptcy committed*.—If the wife of a bankrupt has lands before marriage, unless they are settled upon her for her separate use, the husband's interest in them shall be sold, so that the wife can have no farther enjoyment of them until she survives her husband.

CHAPTER THE NINETEENTH

Of Title by Alienation.

Note 1, page 290, last line, words *present interest*.—A covenant for a valuable consideration to settle or convey a possibility, when it arises, will be enforced in equity. *Fonbl. Tr. of Eq.* 202.

Note 2, page 292, line 15, words *restrain it*.—In *Cro. Eliz.* 398. the opinion of Fitzherbert is denied to be law, and *de non sane memory* held to be a bad plea to an action of debt upon an obligation. See much learning respecting lunatics, collected in Mr. Fonblanque's edition of the Treatise of Equity, p. 40, & seq.

• Note 3, page 293, line 18, word *merchandize*.—It seems that he has not even this exception in his favour. *Harg. Co. Litt.* 2.

CHAPTER THE TWENTIETH.

Note 1, page 296, line 36, words *grantor himself*.—This I conceive is only true of a bargain and sale; for “herein it is said to differ from a gift, that this may be without any consideration or cause at all; and that hath always some meritorious cause moving it, and cannot be without it.” *Shep. Touch.* 221. But otherwise a voluntary conveyance is good both in law and equity. *Tr. of Eq.* i. 1. c. 5. f. 2. It used to be thought, if a person made a voluntary grant of lands, although he could not refuse them himself; yet if he afterwards made another conveyance of them for a valuable consideration, that the first grant would be void with regard to this purchaser under the 27 Eliz. c. 4. But it was determined by lord Mansfield and the court, that there must be some circumstance of fraud to vacate the first conveyance, the want of consideration alone not being not sufficient. *Cowp.* 705.

But if a person is indebted at the time of making a voluntary grant, or becomes so soon afterwards, it will be considered fraudulent and void with respect to creditors, under the 13 Eliz. c. 5.

And if a person makes a voluntary grant, and afterwards becomes bankrupt, whether he was indebted or not at the time, it will be void by 1 Jac. c. 15. and the estate granted may be conveyed by the commissioners to the assignees for the benefit of the creditors. 1 At. 93.

Note 2, page 304, line 16, words *than any warranty*.—The executors and administrators are bound by every covenant without being named, unless it is such a covenant as is to be performed personally by the covenantor, and there has been no breach before his death. *Cro. Eliz.* 553.

Note 3, page 319, line 26, words *of time*.—By various acts of parliament, and also frequently by private settlements, a power is granted of making leases in possession, but not in reversion, for a certain term; the object being that the estate may not be incumbered by the act of the party beyond a specific time. Yet persons, who had this limited power of making leases in possession only, had frequently demised the premises to hold *from the day of the date*; and the courts in several instances had determined that the words *from the day of the date* excluded the day of making the deed; and that of consequence these were leases in reversion, and void. But this question having been brought again before lord Mansfield and the court of king's bench, that learned lord proved, with his usual ability,

that *from the day* might either be inclusive or exclusive of the day; and therefore that it ought to be construed so as to effectuate these important deeds, and not to destroy them: *Pugh v. Duke of Leeds, Coop. 714.*

Note 4, page 322, line 23, words *reserved in money*.—The price of a quarter of wheat being at present near 50s. and the colleges receiving a quarter of wheat, or its value, for every 13s. 4d. which they are paid in money, it follows that the corn rent will be in proportion to the money rent nearly as four to one.

But both these rents united are very far from the present value. Colleges, therefore, in order to obtain the difference, generally take a fine upon the renewal of their leases. It was a great object to colleges to restrain those in possession from making long leases, and impoverishing their successors by receiving the whole value of the lease by a fine at the commencement of the term.

The corn rent has made the old rent approach in some degree nearer to its present value; otherwise it should seem the principal advantage of a corn rent is to secure the lessor from the effect of a sudden scarcity of corn.

Note 5, page 326, line 33, words *cease and be void*.—In a late case it was determined, where an incumbent had leased his rectory, and had been afterwards absent for more than eighty days in a year, that his tenant could not maintain an ejectment against a stranger who had got into possession without any right or title whatever. *2 T. R. 749.*

Note 6, page 323, line 1, words *any one year*.—If the curate leases over, the lease will become void by his absence; but not by the absence of the incumbent. *Gibb. 740.*

Note 7, page 327, line 3, words *place of the assignor*.—This is far from being universally true; for there are a great variety of distinctions when the assignee is bound by the covenants of the assignor and when he is not. The general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants, which do not run with the land. As if a lessee covenants for himself, executors, and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound; but in that case, the assignee will be bound, if the lessee has covenanted for himself and assigns. The assignee in no case is bound by the covenant of the lessee, to build a house for the lessor any where off the premises, or to pay money to a stranger. *Spencer's case, 5 Co. 16.* The assignee is not bound by a covenant broken before assignment. *3 Burr. 1271.* See *Com. Dig. Covenant*. But if an underlease is made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessee, like an assignee of the whole term. *Doug. 174.*

Note 8, page 336, line 11, words *cestuy que use*.—It is the practice to introduce only the names of the trustee and the *cestui que trust*; the estate being conveyed to A and his heirs, to the use of A and

his heirs, in trust for B and his heirs; and thus this important statute has been effectually repealed by the repetition of half a dozen words.

Note 9, page 336, line 23, words *perform the trust*.—I should be inclined to think that the case as expressed by the learned Judge would be construed an use executed by the statute. In the authority referred to in *Eq. Ca. Abr.* 383. the trustees were first to pay legacies and annuities, and then to pay over the surplus to a married woman for her separate use. To prevent a trust from being executed by the statute in cases of this kind, it seems necessary that the trustees should have some control and discretion in the application of the profits of the estate, as to make repairs, or to provide for the maintenance of the *cestui que trust*. 1 *Bro.* 75. 2 *T. R.* 444. Where there is no such special circumstance in the grant, it appears to be equivalent to a direction to the trustees to permit the *cestui que trust* to take the profits of the estate, which is fully established to be an use executed. *Eq. Ca. Abr.* 383.

Note 10, page 337, line 32, words *well grounded principle*.—It has been decided, that when the legal and equitable estates meet in the same person, the trust or equitable estate is merged in the legal estate; as if a wife should have the legal estate and the husband the equitable; and if they have an only child, to whom these estates descend, and who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to an heir on the part of the mother; and thus, which appears strange, the beneficial interest will pass out of one family into another, between whom there is no connexion by blood. *Doug.* 741.

Before the statute of uses there was neither dower nor tenancy by the courtesy of an use, p. 331. It is therefore an unaccountable inconsistency, that; since the statute, the husband should have courtesy of a trust estate, and that the wife should out of a similar estate be deprived of dower. See *ante*, p. 135, n. 11.

Note 11, page 340, line 24, words *charge upon the lands*.—If in a bond the obliger bind himself, without adding his heirs, executors, and administrators, the executors and administrators are bound but not the heir. *Slepp. Touch.* 369. A bond does not seem properly to be called an incumbrance upon land; for it does not follow the land like a recognizance and a judgment; and even if the heir at law alienes the land, the obligee in the bond, by which the heir is bound, can have his remedy only against the person of the heir to the amount of the value of the land; but he cannot follow it when it is in the possession of a *bonâ fide* purchaser. *Bull. N. P.* 175.

Note 12, page 340, line 36, words *from such a transaction*.—And if the bond be simply conditioned for the payment of money, yet if it was in fact given upon a *turpis contractus*, a contract either illegal or immoral, it has been determined, that the turpitude of the transaction may be pleaded in bar to an action upon the bond in a court of law. 2 *Will.* 347. But it is the common practice to

apply to a court of equity for an injunction to such actions. Where bonds have been given in consideration of seduction and incontinence, a distinction has been made between bonds given for future cohabitation, which being for a clear immoral consideration, are void, (3 Burr. 1568.) and those which are given as a compensation (the *premium pudoris*) for the injury done to a woman by her seducer, which, in general, are good. 2 P. Wms. 432. 2 Willf. 339. Yet in one case, where a young woman had been seduced by a married man, and had occasioned a separation between him and his wife, lord Hardwicke held that she was too criminal to derive any benefit from such a bond. 2 Vef. 160. Fendl. Tr. of Eq. 216.

Note 13, page 343, (last line) words *use of registers*.—By the register acts, a registered deed shall be preferred to a prior unregistered deed; yet it has been decreed by lord Hardwicke, if the subsequent purchaser by the registered deed had previous notice of the unregistered one, he shall not avail himself of his deed, but the first purchaser shall be preferred. 1 Vef. 64.

CHAPTER THE TWENTY-FIRST.

Of Alienation by matter of Record.

Note 1, page 354, line 28, words *right mind*.—This is the chief excellence and use of a fine, that it confirms and secures a suspicious title, and puts an end to all litigation after five years. Other conveyances and assurances admit an entry to be made upon the estate within twenty years, and in some instances, the right to be disputed in a real action for sixty years afterwards. Harg. Co. Litt. 121. a. n. 1.

Note 2, page 355, line 32, words *of any estate*.—A wife may join her husband in either a fine or recovery to convey her own estate and inheritance, or an estate settled upon her by her husband as her jointure, or to convey the husband's estate discharged of dower. 1 Cru. 99. 2 Cru. 143. Pig. 123. But if a jointress, after her husband's death, levies a fine or suffers a recovery without the consent of the heir, or the next person entitled to an estate of inheritance, the fine or recovery is void, and is also a forfeiture of her estate. 11 Hen. VII. c. 20. Pig. 75.

Note 3, page 357, line 13, words *allotted by law*.—It is not necessary to be in possession of the freehold in order to levy a fine; but if any one entitled to the inheritance, or to a remainder in tail, levies a fine, it will bar his issue and all heirs who derive their title through him. Hob. 333. A fine by tenant in tail does not affect subsequent remainders, but it creates a base or qualified fee determinable upon the failure of the issue of the person to whom the estate was granted in tail; upon which event the remainder-man may enter. If tenant in tail, with an immediate reversion in fee, levies a fine, the base fee merges in the reversion, which will become liable to all the incumbrances of the ancestors, from whom the

estate tail descended ; as judgments, recognizances, and such leases as are void with respect to the issue in tail. 5 *T. R.* 108. 1 *Cru.* 274. A recovery suffered by any tenant in tail lets in all the incumbrances created by himself, which were defeasible by the issue in tail, and after the recovery they will follow the lands in the hands of a *bonâ fide* purchaser. *Pig.* 120. 2 *Cru.* 287.

Note 4, page 360, line 24, words *can never take place*.—Fines and recoveries are now considered as mere forms of conveyances or common assurances, the theory and original principles of them being little regarded. Chief justice Willes has declared that “Mr. Pigot has confounded himself and every body else who reads his book, by endeavouring to give reasons for and explain common recoveries. I only say this,” he adds “to shew that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense. They have been in use some hundreds of years, have gained ground by time, and we must now take them, as they really are, common assurances.” 1 *Wils.* 73.

Note 5, page 362, line 18, words *were the recoveries*.—If a tenant in tail, to whom the estate has descended *en parte materna*, suffers a recovery, and declares the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father, and *vice versa* ; but if he took the estate tail by purchase, the new fee will descend to the heirs general. 5 *T. R.* 104. If then a person, who has inherited an estate tail from his mother, wishes to cut off the intail and to make the estate descendible to his heirs on the part of the father, after the recovery he ought to make a common conveyance to trustees, and to have the estate reconveyed back by them, by which means he will take the estate by purchase, which will then descend to his heirs general.

CHAPTER THE TWENTY-SECOND.

Of Alienation by Special Custom.

Note 1, page 368, line 2, words *to admission*.—Unless a surrender is made by the testator some time before his death to the use of his last will and testament, the devise of a copyhold is in general absolutely void, and the estate descends to the heir at law ; but in three instances of a court of equity will interfere and will supply the defect of a surrender, *viz.* when copyholds are devised for the payment of debts, and in favour of a wife or younger children. Yet a wife or younger children will not be relieved in equity, if the heir is disinherited or unprovided for. 1 *Atk.* 387. 3 *Bro.* 229. 1 *Con's P. Wms.* 60. If both freehold and copy hold estates are devised for the payment of debts, the chancellor will not supply the defect of the surrender of the copyhold, unless the freehold is insufficient. 1 *Bro.* 273. 2 *Bro.* 325.

Equity will not assist a brother, grand-children, or a natural child. 3 *Atk.* 189. 2 *Ves.* 582.

Note 2, page 368, line 29, word *trespass*.—The surrenderee would not now be considered a trespasser; for it has been determined that he may recover in an ejectment against the surrenderor, upon a demise laid after the surrender, where there was an admittance of the nominee before trial: But as the surrenderor after the surrender is considered merely a trustee for the nominee, it should seem that the decision would have been the same even if the subsequent admittance had not been proved. 1 T. R. 600.

Note 3, page 371, line 28, words *use be pleased*.—The heir having as complete a title without admittance as with it, against all the world but the lord, the court of king's bench will not grant a mandamus to compel the lord to admit him. 2 T. R. 197.

Note 4, page 372, line 10, word *desease*.—Copyholds are not within the statute *de donis*, and cannot be intailed without a special custom within the manor; and where such a custom exists, there may also be a custom to bar the estate-tail, by a recovery suffered in the lord's court; but if no such custom appears of barring by recovery, the intail may be barred by surrender, or otherwise it would amount to a perpetuity. 2 Vef. 601. Yet in some manors, the custom of barring by one mode, is coexistent with the custom of barring by the other. 2 Bl. Rep. 944.

CHAPTER THE TWENTY-THIRD.

Of Alienation by Devise.

Note 1, page 375, line 27, words *feme covert*.—Where lands are conveyed to trustees, a married woman may have the power of appointing the disposition of them after her death, which appointment must be executed like the will of a *feme sole*, and will be subject to the same rules of construction. 2 Vef. 610. 1 Bro. 99. And though the contrary has been held, yet it has been determined by the house of lords, that the appointment of a married woman is effectual against the heir at law; though it depends only upon an agreement of her husband before marriage, without any conveyance of the estate to trustees. 6 Bro. P. C. 156.

Note 2, page 376, line 28, words *credible witnesses*.—Copyholds and terms for years are not within the statute, but will pass by any will, which is sufficient to bequeath personality. 2 Atk. 37. 2 Bro. 58.

Note 3, page 376, line 33, words *with his consent*.—It has been determined, that one will cannot be revoked by another will, though it should contain a clause declaring all former wills to be revoked, unless the second is valid and effectual as a will. 2 P. Wms. 343. Yet a will may be revoked by an instrument written merely for the purpose of revocation; but it must be attested by three witnesses, and the testator must sign it in *their presence*, which is not necessary in the execution of a will. The reason of this difference, if it was designed, is not obvious. 29 Car. 2. c. 3. f. 6.

Note 4, page 376, line 35, words *of a child*.—Marriage and the birth of a posthumous child amount to a revocation. 5 T. R.

Note 5, page 377, line 4, words *a safer way*.—I conceive that writing the name at the beginning would never be considered a signing according to the statute, unless the whole will was written by the testator himself; for whatever is written by a stranger, after the name of the testator, affords no evidence of the testator's assent to it, if the subscription of his name in his own hand is not subjoined.

Note 6, page 377, line 9, words *the instrument*.—It has been determined to be in his presence if he is apprized at the time of the attestation of the witnesses, and was in a situation from which he might have seen the witnesses subscribe their names. As in a case where the testator's carriage was drawn opposite the windows of an attorney's office, in which the witnesses attested the will, this was clearly determined to be in the testator's presence. 1 Bro. 99. The object of this requisition in the statute is to prevent the testator and the witnesses from being imposed upon by the substitution of another instrument or a fabricated will. Hence the attestation of a will is void, if at the time the testator is in a state of insensibility. Doug. 229.

Note 7, page 377, line 34, word *legacies*.—This extends to devises, and every interest given to the witnesses.

Note 8, page 378, line 7, word *insufficient*.—The subscribing witnesses may afterwards be admitted to prove the testator was insane when he executed his will. But in a case where the three witnesses and twelve servants swore to the testator's insanity, they were contradicted by the whole neighbourhood, and the subscribing witnesses were afterwards convicted of perjury. Lowe v. Jolliffe, 1 Bl. Rep. 365.

Note 9, page 378, line 20, words *and the devisee*.—A devise to raise a portion for younger children according to an agreement before marriage, and a devise for the payment of debts, are exceptions in the statute, *sect.* 4. But it has been held, that the payment of the debt must be provided for effectually in order to bring it within the exception. 1 Bro. 311. 2 Bro. 614.

Note 10, page 378, (last line) words *his will*.—Lord Mansfield has declared, that this does not turn upon the construction of the statute 32 Henry VIII. c. 1. (as some have supposed) which says, that any person *having* lands, &c. may devise: For the same rule held before the statute, where lands were devisable by custom. Corp. 90. It has been determined, that where a testator has devised all his lands, or all the lands which he shall have at the time of his death; if he purchases copyholds after the execution of the will, and surrenders them to the uses declared by his will, they will pass by the will. Corp. 130. Or if the testator, after making such a devise, purchases freehold lands, and then makes a codicil duly executed according to the statute, though no notice is taken of the after purchased lands; yet if the codicil is annexed to, or confirms the will, or as it seems has a reference to it, this amounts to a republication of the will, and the after purchased lands will pass under the general devise. Corp. 158. Cam. 383. 4 Bro. 2.

Note 11, page 379, line 3, words *his will*.—If an estate is given to A and his heirs, or to A and the heir of his body, or any interest whatever to A, and A dies before the testator, the devise is lapsed and void, and the heir of A can claim no benefit from the devise. A severe instance of this rule occurred not long ago in Ireland. A father devised his estate to his eldest son and the heirs of his body, and upon failure of his issue to his second son in like manner in tail; the eldest son died before the father, leaving several children; and the father, supposing that the eldest of them would take under the devise, made no alteration in his will; the consequence was, that the devise was lapsed and void, and the second son was entitled by the will, to an estate-tail, in exclusion of the children of the eldest brother, the first object of the father's bounty and regard.

The court of king's bench in Ireland decided in favour of the grandson; but that decision was reversed by the king's bench and house of lords here, the question being too clear to admit a doubt. *White v. White*, 1 Bro. 219. *Doug.* 323.

Note 12, page 381, line 8, words *in law*.—Such was held to be the law in the time of lord Coke; but now where the same estate is given by the testator to two persons in different parts of his will, they are construed to take the estate as joint-tenants or tenants in common, according to the limitations of the estates and interests devised. 3 *Atk.* 493. *Harg. Co. Litt.* 112. b.

Note 13, page 381, line 17, words of *procreation*.—In the celebrated case of *Perrin v. Blake*, the question was this, *viz.* whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction, which would have clearly been put upon the same words, if they had been used in a deed. The devise in substance was as follows; the testator declared, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his own life; and to that intent I give my son John Williams my estate during his natural life, remainder to my brother-in-law during the life of my son John Williams; (the design of that being to support the contingent remainder) remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the court of king's bench determined, that John Williams took an estate for life only; but upon a writ of error to the exchequer chamber, the decision was reversed, and six out of eight of the other judges held, that John Williams took an estate-tail, which of consequence gave him an absolute power of selling or disposing of the estate as he pleased. The discussion of this subject called forth a splendid display of legal learning and ingenuity. Yet it has since been observed by a learned judge, that as one of the judges held that John Williams took an estate-tail, because he was of opinion that such might be presumed to be the testator's intention, no argument in future can be drawn from this case; because one half of the judges relied upon the ground of intention alone. And the Editor entirely concurs with that learned judge, that it is the first and great rule in the exposition of wills, and to which all other rules must bend, that the intention of the testator expr

ed in his will shall prevail, provided it be *consistent with the rules of law*; that is, provided it can be effectuated consistently with the limits and bounds which the law prescribes. Mr. J. Buller, *Doug.* 322. To argue that the intention shall be frustrated by a *rule of construction of certain words*, is to say that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind.

Where technical phrases and terms of art are used alone by a testator, it is fair to presume that he knew their artificial import and signification, and that such was his will and intention; but where he happens to introduce them, and at the same time in effect declares, that I do not intend what conveyancers understand by these words, but my intention is to dispose of my estate directly contrary to the construction generally put upon them; surely courts of justice are, or ought to be, as much at liberty, or rather under an obligation to effectuate that intention as far as the law will admit, as if he had expressed it in the most apt and appropriate language. 1 Bl. Rep. 672. 4 Burr. 2579. Doug. 329. Fearn, 113. Harg. Tracts, 351. 490.

Note 14, page 381, line 25, words *nobody else can*.—But it has been thought, that, if it is given to a stranger after the wife's death, the devise raises no implication in favour of the wife, for it may descend to the heir during the life of the wife, which possibly may have been the testator's intention. Cro. Jac. 75.

Note 15, page 381, line 33, words *more than two devisees*.—The contrary has for some time been fully established, and this has been laid down by lord Mansfield as a general rule; viz. wherever cross remainders are to be raised between two and no more, the favourable presumption is in support of cross remainders; where between more than two, the presumption is against them; but the intention of the testator may defeat the presumption in either case.

And the Editor conceives that cross remainders would be raised in every case, in which it appears to be the testator's intention that the subsequent devisee shall take nothing till the issue of all the first devisees are extinct. Cowp. 777. 797. 4 T. R. 710.

CHAPTER THE TWENTY-FIFTH.

Of Property in Things Personal.

Note 1, page 393, line 32, words *for food*.—But it is not felony to steal such animals of a wild nature, unless they are so confined that the owner can take them whenever he pleases; or, if they are not confined, unless they are reduced to tameness, and known by the thief to be so. 1 Hawk. b. 1. c. 23. f. 26.

Note 2, page 399, line 18, words *real estates*.—Residuary legatees and executors are joint tenants, unless the testator uses some expression which converts their interest into a tenancy in common; and if one dies before a division or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. 2 P. Wms. 113. 3 Bro. 455. See p. 197. ante.

CHAPTER THE TWENTY-SIXTH.

Of Title to Things Personal by Occupancy.

Note 1, page 403, line 27, words *royal privilege*.—See this controverted by the Editor in page 423, note (10.)

Note 2, page 404, line 4, words *personal chattels*.—The right to emblements does not seem to be aptly referred to the principle of occupancy; for they are the continuation of an inchoate, and not the acquisition of an original, right.

Note 3, page 404, line 29, words *of improvement*.—This also has long been the law of England; for it is laid down in the Year-books, that whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure. *5 Hen. VII. fo. 15. 12 Hen. VIII. fo. 10.*

Note 4, page 407, line 8, words *the common law*.—Whether the productions of the mind could communicate a right of property or of exclusive enjoyment in reason and nature; and if such a moral right existed, whether it was recognized and supported by the common law of England; and whether the common law was intended to be restrained by the statute of queen Anne, are questions, upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted.

These questions were finally so determined that an author has no right at present beyond the limits fixed by the statute. But as that determination was contrary to the opinion of lord Mansfield, the learned Commentator, and several other judges, every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance. Nothing is more erroneous than the common practice of referring the origin of moral rights, and the system of natural equity, to that savage state, which is supposed to have preceded civilized establishments; in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right I conceive is to inquire, whether it is such as the reason, the cultivated reason, of mankind must necessarily assent to.

No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted.

And if any private right ought to be preserved more sacred and inviolable than another, it is that where the most extensive benefit flows to mankind from the labour by which it is acquired. Literary property, it must be admitted, is very different in its nature from a property in substantial and corporeal objects, and this difference has led some to deny its existence as property; but whether it is

sui generis, or under whatever denomination of rights it may more properly be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations.

Thus considered, an author's copyright ought to be esteemed an inviolable right, established in sound reason and abstract morality.

No less than eight of the twelve judges were of opinion that this was a right allowed and perpetuated by the common law of England; but six held, either that it did not exist, or that the enjoyment of it was abridged by the statute of queen Anne, and that all remedy for the violation of it was taken away after the expiration of the terms specified in the act; and agreeable to that opinion was the final judgment of the lords.

See the arguments at length of the judges of the king's bench, and the opinions of the rest, in 4 *Burr.* 2303.

In Ireland there is yet no statute to protect the copyright of authors. To that circumstance we ought perhaps to attribute the paucity of publications in Ireland upon law, history, and those sciences, which require laborious perseverance. Men of genius and learning in that country are stimulated only by the incentive, which lord Camden splendidly described in the conclusion of his argument against literary property. "Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions. Fourteen years are too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world. When the bookseller offered Milton five pounds for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it."

Note 5, page 411, line 20, word *duration*.—Where an author transfers all his right or interest in a publication, upon his surviving the first fourteen years, the second term will result to his assignee and not to himself. 2 *Bro.* 80. Musical compositions have been held to be within the meaning and protection of the statute. *Corpus*. 623. A representation of a dramatic performance upon the stage is not a publication, for which the author can maintain an action as for an invasion of his right. 5 *T. R.* 245. Yet no one has a right to take down a play in short-hand, and to print it before it is published by the author. *Amb.* 694. A fair and *bonâ fide* abridgment of any book is considered a new work; and however it may injure the sale of the original, yet it is not deemed in law to be a piracy or a violation of the author's copyright. 1 *Bro.* 451. 2 *Atk.* 141.

An action may be brought, or an injunction obtained in a court of equity, though the publication be not entered in the register of the stationers company, 1 *Bl. Rep.* 330; but no one can be prosecuted for the penalties introduced by the statute, viz. a forfeiture of one penny for every sheet, and the sheets are to be defaced, unless

the work is entered according to the directions of 15 Geo. III. c. 53. which statute has secured to the universities and colleges therein mentioned, a perpetuity in the copyright of all books given or devised in trust for them by the authors. By the 12 Geo. H. c. 36. if any book be originally written and published in this country, and be afterwards re-printed abroad, and be imported and exposed to sale here, the importer and seller shall forfeit all such books to be cancelled; and for every offence shall forfeit also five pounds, and double the value of the books, to be recovered with costs. Every sale of one book, or a parcel, is a distinct offence, by which a new penalty is incurred. 3 T. R. 509. Under this statute it seems immaterial whether the author's copyright is extinct or not, if the book has been re-printed in England within twenty years.

This statute was intended for the encouragement of printing in this country.

Note 6, page 407, line 18, words 17 Geo. III. c. 57.—The principal differences in these three statutes concerning prints seem to be these: the 8 Geo. II. gives an exclusive privilege of publishing to those who invent or design any print, for fourteen years only; the 7 Geo. III. extends the term to twenty-eight years absolutely, to all who either invent the design or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies, to be destroyed, and 5s. for each copy; the 17 Geo. III. gives the proprietor an action to recover damages and double costs for the injury he has sustained by the violation of his right.

Note 7, page 417, line 30, words *king's patentee*.—The patent is granted upon condition that the invention is new, or new in this country; and that the patentee shall deliver a specification of his invention, containing such a description, plan, or model of the machine or article, as to be intelligible to every artist conversant in the same trade or manufactory.

Or the invention must be so described that the public may, at the end of fourteen years, have the use of it in as cheap and beneficial a manner as the patentee himself uses it. Hence if the specification be in any part materially false, defective, obscure, or give directions which tend to mislead the public, the patent is against law and cannot be supported. The specifications are preserved in an office for public inspection. Some patents, in very valuable manufactures, have been declared void, on account of the designed obscurity of the specification. *Bull. N. P.* 76. 1 T. R. 602.

CHAPTER THE TWENTY-SEVENTH.

Of Title by Prerogative and Forfeiture.

Note 1, page 409, line 27, words in the same circumstances.—If a joint tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported

by Plowd. 262. Eng. ed. Sir James Hales, a judge of the common pleas, and his wife were joint-tenants of a term for years; sir James drowned himself, and was found *fel de se*; and it was held that the term did not survive to the wife, but that sir James's interest was forfeited to the king by the felony, and that it consequently drew the wife's interest along with it. The argument of lord Chief Justice Dyer is remarkably curious: "The felony (says he) is attributed to the act; which act is always done by a living man," and in his life-time, as my brother Brown said; for he said sir James Hales was dead; and how came he to his death? It may be answered, by drowning; and who drowned him? Sir James Hales; and when did he drown him? in his life-time. So that sir James Hales being alive, caused sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way but by distressing out of him, from the time of the act done in his life-time, which was the cause of his death, the title and property of those things which he had in his life-time."

This must have been a case of notoriety in the time of Shakespeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia. See Sir J. Hawkins's note in Stephens's edition.

Note 2, page 412, line 5, words *game laws*.—I am inclined to think, that this reason did not operate upon the minds of those, who framed the game laws of this country; for in several ancient statutes the avowed object is to encourage the use of the long bow, the most effective armour then in use: and even since the modern practice of killing game with a gun has prevailed, every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.

Note 3, page 412, line 14, words *deprived him*.—I can by no means accede even to the combined authority of Puffendorf and the learned Judge, that there is not any natural injustice in abridging a person of the means of acquiring a future property. The right of acquiring future property may be more valuable than the right of retaining the present possession of property. A right of common, like all other rights, must bear a certain value; and it certainly is as great injustice to deprive any one of the right of hunting, fishing, or of digging in a public mine, as it is to take from him the value of that right in money, or any other species of private property.

Note 4, page 413, line 1, words *St. Jerome*.—viz. *Venctorem nunquam legimus sanctum*.

Note 5, page 413, line 14, words *in lieu thereof*.—When arch-bishop Abbot by an unfortunate accident had killed a parkkeeper in shooting at a deer with a cross-bow, though it was allowed no blame

could be imputed to the arch-bishop but from the nature of the diversion, yet it was thought to bring such scandal upon the church that an apology was published upon the occasion, which was warmly and learnedly answered by sir Henry Spelman, who maintained that the arch-bishop was in the exercise of an act prohibited by the canons and ordinances of the church, and that he was even disqualified from exercising his spiritual functions. The king referred the consideration of the subject to the lord keeper and several of the judges and bishops, who recommended it to his majesty to grant his grace a dispensation *in majorem cautelam, si qua forte sit irregularitas*; which was done accordingly. See *Reliquia, Spelm.* 107.

Note 6, page 419, line 28, words *by his prerogative*.—See p. 423, note 10, *post*.

Note 7, page 415, line 27, words *to the king*.—See this controverted in p. 423, n. 10.

Note 8, page 418, line 15, words *or freehold*.—The Editor apprehends that what the learned Judge has here stated respecting the first permission, has arisen from a misconception of the subject. The first qualification act is the 13 R. II. c. 13. the title of which is "None shall hunt but they who have a sufficient living." The preamble states, that "divers artificers, labourers, servants, and groomes, keep grey-hounds and dogs, and on the holydays, when good christian people be at church hearing divine service, they go a hunting in parks, and warrens, and connigrees of lords and others, to the very great destruction of the same, and sometimes under such colour they make their assemblies, conferences, and conspiracies for to rise and disobey their allegiance; it is therefore ordained, that no artificer, labourer, or other layman, which hath not lands or tenements to the value of 40s. by the year, nor any priest to the value of 10l. shall keep any dogs, nets, nor engines, to destroy deer, hares, nor conies, nor other gentlemen's game, upon pain of one year's imprisonment."

This statute clearly admits and restrains their former right: the 1 Jac. I. c. 27. which seems intended for the encouragement of hawking, the most honourable mode of killing game at that time, begins with a general prohibition to all persons whatever to kill game with guns, bows, setting dogs, and nets; but there is afterwards a proviso in the act, that it shall and may be lawful for persons of a certain description and estate to take pheasants and partridges, upon their own lands, in the day-time, with nets. This proviso and permission clearly refers to the preceding prohibition introduced by the statute, and by no means gives a new permission to the persons thus qualified, which they did not possess antecedently to that statute.

The Editor trusts that those who will take the trouble to examine the statute, will be convinced of the truth of this remark; and that the correction of this error alone will contribute in some degree to the refutation of the doctrine which the learned Judge has advanced in this chapter and other parts of the Commentaries, viz.

that all the game in the kingdom is the property of the king or his grantees, being usually the lords of manors, p. 15, *ante*; game is royal property, 4 vol. 174; and the new constitutions vested the sole property of all the game in England in the king alone. *Id.* 415.

Note 9, page 418, line 29, words *them before*.—Gamekeepers were first introduced by the present qualification act, 22 & 23 Car. II. c. 25. and various regulations have been made respecting them by subsequent statutes. As all these statutes seem to be in force in some degree at present, and as it is a subject interesting to sportsmen, I shall subjoin a short abstract of them according to their chronology.

The 22 & 23 Car. II. c. 25. authorises lords of manors of the degree of an esquire to appoint under their hands and seals gamekeepers, who shall have power within the manor to seize guns, dogs, nets, and engines kept by unqualified persons to destroy game; and by warrant from a justice of peace, to search in the day-time the houses of unqualified persons upon good ground of suspicion, and to seize for the use of the lord, or to destroy guns, dogs, nets, &c. kept for the destruction of the game. This statute does not limit the number of those to whom such power and authority may still be given. The 4 & 5 W. & M. c. 23. f. 4. gives to these gamekeepers the same protection in resisting offenders in the night-time, as the law affords to the keepers of ancient parks. The 5 Ann. c. 14. f. 4. permits any lord or lady of a manor to empower gamekeepers to kill game within the manor.

The 9 Ann. c. 25. f. 1. enacts, that no lord or lady of a manor shall appoint more than one gamekeeper, within one manor, with the power of killing game; and his name shall be entered with the clerk of the peace. And by 3 Geo. I. c. 11. the gamekeeper, who shall have the power to kill game within the manor, shall either be a qualified person, a domestic servant, or a person employed to kill for the sole use of the lord or lady of the manor. The only use of appointing a qualified person a gamekeeper is, to give him the power as before described of seizing the dogs, guns, and other engines of unqualified persons within the manor.

By the 25 Geo. III. c. 50. and 31 Geo. III. c. 21. every deputation of a gamekeeper shall be entered with the clerk of the peace of the county in which the manor lies, and for a certificate thereof shall be charged one guinea.

By the 5 Ann. c. 14. f. 4. any justice of peace may within his county take either game, or dogs, and instruments kept for the destruction of game, from unqualified persons, and retain them for his own use. But it has been decided, that though gamekeepers are liable to the same penalties as unqualified persons for killing game out of their respective manors, yet no one is justified in taking from them their dogs and guns, when they are out of the limits of their lord's manor, even in pursuit of game. 2 Will. 387. *Rogers v. Carter*.

No lord of a manor can grant to another person the power of appointing a gamekeeper, without a conveyance also of the manor.

A right to a manor cannot be tried in a penal action under the game-laws. 5 T. R. 19. This power of appointing a gamekeeper has, no doubt, introduced the very erroneous notion, that a lord of a manor has a peculiar right to the game, superior to that of any other land-owner within the manor, although his estate be a sufficient qualification to entitle him to follow the amusements of a sportsman.

Gamekeepers, we have seen, were first created by 22 & 23 Car. II. c. 25; by the preceding qualification act, 7 Jac. I. c. 11. their power was given to the constable and headborough; and I apprehend it was transferred to the persons appointed by lords of manors, for no other reason than because it was probable they were the most interested in the preservation of the game, by having in general the most extensive range to pursue it in, viz. upon their own estates and wastes. And I conceive the 22 & 23 Car. II. c. 25. is the first instance either in our statutes, reports, or law treatises, in which lords of manors are distinguished from other land-owners with regard to the game.

Note 10, page 419, line 8, words *propter privilegium*.—The learned Judge has frequently, and even zealously inculcated the position that the common law has *vested the sole property of all the game in England in the king alone*, and of consequence that no man, let his rank and fortune be what they may, is qualified to kill game, or is exempt from the original penalties, unless he possesses some peculiar privilege derived from the king. This doctrine, enforced by so celebrated an author, apparently the result of mature deliberation, and which has been so long acquiesced in, the Editor should have questioned with diffidence, if he had not been fully persuaded that it was unsupported by any prior authority, and that the authorities to the contrary were numerous and irresistible.

The learned Judge himself admits, that this is a novel doctrine so such as call themselves qualified sportsmen; yet he has referred to no preceding authority whatever in any part of the Commentaries; but in p. 419. he has deduced this doctrine from two general principles, viz. *that the king is the ultimate proprietor of all the lands in the kingdom, and therefore he has the right of the universal soil to enter thereon, and to chase and take such creatures at his pleasure*. From the king's right to the universal soil, it is not evident why he should have a better right to take such creatures than to take any other production of that soil.

And even if the king's majesty should have a right to enter all the lands of the kingdom in pursuit of game, this affords no inference that the land owner may not enjoy this right concurrently with the king. But although no complaint can perhaps be made against the king for entering the lands of his subjects, it has been determined that this power cannot be given to his foresters and servants in a case in Keilway, which I shall presently have occasion to take notice of.

The other general principle relied upon by the learned Commentator is, *another maxim of the common law, which he says he has frequently cited and illustrated, that these animals are bona vacantia, and*

having no other owner, belong to the king by his prerogative. It has been determined, that fish, if not confined as in a trunk, cannot be called *bona et catalla*; and so game till it is taken is every where said to be *nullius in bonis*. But I am inclined to think that the very reverse of the maxim is true, and that *bona vacantia* belong to the first occupant or fortunate finder, except in those instances particularly specified by the law, and in which they are expressly given to the king. See 1 vol. 311. n. 12. A person might have acquired by occupancy, even in the last century, an estate in real property. See p. 261, ante. If a pearl should be found in an oyster, no lawyer I think would say, that it was the property of the king. If all wild animals had belonged to the crown, it would have been superfluous to have specified whales, sturgeons, and swans. Lord Coke tells us, that "a swan is a royal fowl; and all those the property whereof is not known, do belong to the king by his prerogative: and so whales and sturgeons are royal fish, and belong to the king by his prerogative." Case of swans, 7 Co. 16. "And the king may grant wild swans unmarked." Ib. 18. But these are the only animals which our law has conferred this honour upon.

It is true that our kings, prior to the *carta de foresta*, claimed and exercised the prerogative of making forests wherever they pleased over the grounds of their subjects: within the limits of these forests certain wild animals were preserved, by severe laws, for the recreation of the sovereign. A district thus bounded at the king's pleasure might have been granted by the king to any of his subjects who enjoyed the exclusive privilege either of a forest, chase, park, or free warren, according to the extent of the jurisdiction and powers conferred by the royal grant; p. 38, ante, n. 17. But beyond the boundaries of these privileged places, neither the king nor any of his grantees claimed a property in the game: for, according to the law of king Canute, *quilibet homo dignus venatione sua, in sylva, et in agris sibi propriis, est in dominio suo*; which law Manwood declares was confirmed by many succeeding kings. Tit. For. pl. 3. If this were so, it cannot be correct what the learned Commentator has advanced, that upon the Norman conquest a new doctrine took place. By the *carta de foresta* all the new-made forests were disafforested and thrown open again; but besides the creation of new forests by the Norman kings, they had also made great additions and encroachments to the ancient Saxon forests: these encroachments were called *purlieu*, and as these were the same grievance to the owners of the land as the new forests, they also were disafforested, but with this distinction, that as the grievance extended only to the landowner, he was allowed to enjoy his lands in as full a manner as he had done before the encroachment; but they still continued with respect to the rest of the world under the forest law jurisdiction. Hence it followed as a consequence, that the owner of a purlieu might hunt and kill game within the limits of the purlieu, as any other man might have done in his own grounds: and the authorities of Lord Coke and Manwood concur, if deer come out of the forest into the purlieu, the purlieu-man may hunt and kill them, provided he does it fairly and without *forefalling*. And this

distinction is made; if a stag can recover the *flum-finghe*, the border of the forest, before the purlicu-man's dogs fasten upon him, he then belongs to the king, or to the owner of the forest, and the purlicu-man must call his dogs back; but if they fasten upon him before he gains the forest, and he drags them into it, he belongs to the owner of the purlicu, who may enter the forest and carry him away. 4 Inst. 303. *Manu. Purlicu.* This alone is decisive, but, there are various authorities to the same effect. In the year-book 12 Hen. VIII. fo. 10. it is held, if a man drive a stag out of a forest and kill him, he shall gain no property in him, because he shall derive no advantage from his own wrongful act; yet if the stag comes of himself beyond the limits of the forest, then any one (if qualified) may kill and take him, for they are *animale fera natura, et nullius in bonis*; and the maxim is *capiat qui capere potest*, i. e. catch that catch can.

That the king has no property in deer or other game, when they are out of a forest, was determined also in a case reported by Keilway, 30, and copied by Manwood, 202. In that case an action of trespass was brought for entering the plaintiff's close; the defendant pleaded, that the place in which the trespass was supposed to be committed was adjoining to the king's forest, and that the plaintiff was bound to impale the said forest, and that for want of paling four deer escaped out of the forest into the plaintiff's land, and that he the defendant entered by the command of the forester to drive them back to the forest. The court held that this plea was not good; "for though the plaintiff was in fault for not paling, yet it was not lawful for the forester or any person to drive the deer out of the ground, or to take them; and the reason was, because the king had no property in them; and this was different from the case of tame cattle, where the property still remains in the owner though they are out of his ground, for which reason he may recapture them wherever he finds them; but it is not so when the beasts are wild."

The learned Judge frequently intimates that no person is exempt from the original penalties; but I am inclined to think that no authority whatever can be found that any penalties were ever inflicted for killing game out of privileged grounds, except those which have been introduced by modern game laws, or the qualification acts. Lord Coke reports that the court held in the case of monopolies, 11 Co. 87, that "it is true that none can make a park, chace, or warren, without the king's license, for that is *quodam modo*, to appropriate those creatures, which are *fera natura, et nullius in bonis*, to himself, and to restrain them of their natural liberty, which he cannot do without the king's license; but for hunting, hawking, &c. which are matters of pastime, pleasure, and recreation, there needs no license, but every one may in his own land use them at his pleasure without any restraint to be made unless by parliament, as appears by the statutes of 11 Hen. VII. c. 17. 23 Eliz. c. 10. and 3 Jac. I. c. 13."

These authorities are also recognized and confirmed in *Bro. Abre. tit. Propertie*, and in Hale's Commentary to F. N. B. 197.

The following may serve as a specimen of the authorities collected by Brooke : *quant beastes sauvages le roye aler hors del forrest, le property est hors del roy* ; and again, *siln fount hors del parke capientis conceditur*.

In a great case which was brought in 1791 from the courts of Scotland before the house of lords, the question was, whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate, for the use of himself and particular friends, authorized by his license, and to exclude all gentlemen, legally qualified, from following that amusement over his waste and other grounds, not specially protected by any particular statute ? The printed cases of the appellant and respondent contain much curious learning upon the Scotch game-laws ; but no idea was suggested that the game in Scotland belonged to the king. For the appellant, who insisted that he had a right to enter as a sportsman upon the respondent's estate, the authority of president Balfour, in his *Practises*, was chiefly relied upon ; viz. " It is " leisome and permitted to all men to chaise hares, foxes, and all " other beistis, beand without forrestis, warrentis, parkis, or wardis." But the judgment of the lords being for the respondent, this permission of course must be confined to a man's own estate. *Livingstone, esq. appellant, v. lord Breadalbane, respondent*. This is precisely the same as the law of England ; for neither a lord of a manor, nor his gamekeeper, can go into any part of the manor, which is not the lord's own estate or waste, without being a trespasser like any other person.

Note 11, page 419, line 36, words *the owners*.—These distinctions never could have existed, if the doctrine had been true that all the game was the property of the king, for in that case the maxim, *In aquali jure potior est conditio possidentis*, must have prevailed.

CHAPTER THE TWENTYEIGHTH

Of Title by Custom.

Note 1, page 427, last line, words *in the executor*.—Or if any chattel be given to a man and the heirs of his body, he takes the entire and absolute interest in it. There have been many fruitless attempts to make pictures, plate, books, and household furniture, descend to the heir with a family mansion. Where they are left to be enjoyed as heir-looms by the persons who shall respectively be in possession of a certain house, or to descend as heir-looms as far as courts of law and equity will admit, the absolute interest of them, subject to the life-interests of those who have life-estates in the real property, will vest in that person who is entitled to the first estate-tail or estate of inheritance ; and upon his death that interest will pass to his personal representative. 1 Bro. 274. 3 Bro. 101.

Note 2, page 428, line 23, words *and the like*.—See p. 285, n. 10, ante.

Note 3, page 429, line 8, words *anterior to the heir*.—The right to sit in a particular pew in a church arises either from prescription as appurtenant to a messuage, or, from a faculty or grant from the ordinary, for he has the disposition of all pews which are not claimed by prescription. *Gibb. Cod.* 221.

In an action upon the case for a disturbance of the enjoyment of a pew, if the plaintiff claims it by prescription, he must state it in the declaration as appurtenant to a messuage in the parish. This prescription may be supported by an enjoyment for thirty-six years, and perhaps any time above twenty years. *1 T. R.* 428. In such an action against the ordinary, the plaintiff must allege and prove repairs of the pew. *1 Wilf.* 326.

Note 4, page 429, line 19, words *of the funeral*.—It has been determined, that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanour; it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. *1 T. R.* 733.

CHAPTER THE TWENTY-NINTH.

Of Title by Succession, Marriage and Judgment.

Note 1, page 433, line 32, words *is determined*.—If he assigns her choses in actions for valuable consideration in her life-time, and she survives, she is bound only to the amount of the consideration, and the residue survives to her. *1 Atk.* 207. *Cox's P. Mss.* 380. But if the husband before marriage makes a settlement upon the wife in consideration of the wife's fortune, the representative of the husband will be entitled to all her things in action: (*3 P. Wms.* 199.) but if it is in consideration of part of the estate only, the residue not reduced into possession will survive to the wife: and where there is a settlement made equivalent to the wife's fortune, though no mention be made of her personal estate, the husband's representative will be entitled to the whole. See *Mr. Butler's note to Co. Litt.* 352. where these distinctions are clearly and fully collected. If the husband cannot recover the things in action of his wife but by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not assist him in recovering the property, unless he either has made a previous provision for her, or agrees to do it out of the estate prayed for; or unless the wife appears personally in court, and consents to the property being given to him. *2 Vesf.* 669. But the court will not direct the fortune in all cases to be paid to the husband, though the wife appears to consent, where no previous provision whatever is made upon her. *2 Vesf.* 579. Lord Thunlow has declared that he did not find it any where decided, that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned; but that a court of equity has much greater consideration for the assignment actually made by contract, than for an assignment by mere operation of law; for as to the

latter, his lordship declared it to be his opinion, that when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, (as in the case of an assignee under a commission of bankrupt,) he stood exactly in the place of the husband, and was subject precisely to the same equity in respect of the wife. *Cox's P. Wms.* 459. But it is determined, the wife shall have the same relief, under a general assignment by the husband of his estate for the benefit of his creditors. *4 Bro.* 139.

But if the wife's fortune is paid to the husband, or he can receive it without applying to a court of equity, such a court can give no relief to the wife. *2 Ash.* 480. *But. Co. Litt.* 351. *1 Fosh. Tr. Eq.* 304.

Note 2, page 435, line 22, words *during the coverture*.—By 29 Car. II. c. 3. s. 25. the husband shall have administration of all his wife's personal estate, which he did not reduce into his possession before her death, and shall retain it to his own use; and if he dies before administration is granted to him, or he has recovered his wife's property, the right to it passes to his personal representative, and not to the wife's next of kin. *1 P. Wms.* 378. *But. Co. Litt.* 351.

Note 3, page 436, line 18, word *creditors*.—The husband may dispose absolutely of his wife's jewels or other paraphernalia in his life-time. *3 Ash.* 394. And although after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover from the heir to the amount of what she is obliged to pay, in consequence of her husband's specialty creditors out of her paraphernalia. *1 P. Wms.* 730.

But she is not entitled to them after his death, if she has barred herself by an agreement before marriage of every thing she could claim out of his personal estate either by the common law or custom. *2 Ash.* 642.

CHAPTER THE THIRTIETH.

Of Title by Gift, Grant, and Contract.

Note 1, page 442, line 3, words *next division*.—If a man sells goods and still continues in possession as visible owner, the sale is fraudulent, and void against creditors. *2 T. R.* 596. But the sale or mortgage of a ship at sea is valid, if the grand bill of sale be delivered to the vendee or mortgagee, and he take possession the first opportunity after the ship arrives in port. *1 T. R.* 462.

Note 2, page 445, line 24, words *perform it*.—See a very learned dissertation upon this passage, and the learned Judge's observations and reference upon a *nudum pactum* in the preceding page, by Mr. Fonblanque in his edition of the Treatise of Equity, 1 vol. p. 326. That learned gentleman abundantly proves that a consideration was not necessary to constitute a binding contract in the civil law; and he concludes, that "from a view of the different modes by which an obligation could be created by the civil law, it appears that, without any consideration, a verbal agreement or promise might,

"in respect of certain prescribed solemnities, acquire a binding force and legal validity ; and further, that for want of a consideration, a written acknowledgment of a debt might be avoided ; and that though a consideration was alleged in writing, it might be denied. If then it be asked, what was a *nudum pactum* by the civil law ? I should submit that, from the above observations, it appears to have been an undertaking to give or to do some particular thing or act, which *neque verbis præcipiis solemnibus vestitum sit, neque factio aut datione rei transit in contractum innominatum.*"

Note 3, page 445, line 37, words *nudum pactum*.—Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations ; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities ; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts ; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds.

In such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. *Ld. Mansfield, 1 Cowp. 290.*

Note 4, page 446, line 8, words *of the drawer*.—Mr. Bonblanque, in his discussion of the subject of consideration, referred to in the last note but one, has taken notice of this inaccuracy : he says what certainly is fully established, "that the want of consideration cannot be averred by the maker of a note, if the action be brought by an indorsee ; but if the action be brought by the payee, the want of consideration is a bar to the plaintiff's recovering upon it." *1 Stra. 674. Bull. N. P. 274.*

Note 5, page 447, line 22, words *his executors*.—If two writs are delivered to the sheriff on the same day, he is bound to execute the first which he receives ; but if he levies and sells under the second, the sale to a vendee, without notice of the first, is irrevocable, and the sheriff makes himself answerable to both parties. *1 Solk. 320. 1 T. R. 729.*

Note 6, page 448, line 4, words *price of them*.—The property does not seem to be *absolutely bound* by the earnest ; for lord Holt has laid down the following rules, viz. "That notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed ; that earnest only binds the bargain, and gives the party a right to demand ; but then a demand without the payment of the money is void ; that after earnest given the vendor cannot sell the goods to another without a default in the vendee ; and therefore if the vendee does not come and pay, and take the goods, the vendor ought to go and request him ; and then if he does not come and pay, and

"take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." 1 *Salk.* 113.

Note 7, page 448, line 18, words *charged therewith*.—It is fully established, that contracts for goods which are not to be delivered immediately, are not within the statute, and are binding without a writing; as an agreement to take a carriage when it is built, and the like. 4 *Burr.* 2101. And this is binding, though in fact the carriage is not delivered within the year; but if the original agreement was, that it should not at any event be delivered till after a year, then the contract will not be valid unless it is reduced into writing.

Note 8, page 450, line 6, words *property in the goods*.—The owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from any one who has purchased them and sold them again, even with notice of the theft, before the conviction. 2 *T. R.* 750.

Note 9, page 451, line 27, words *represented to the buyer*.—The following distinctions seem peculiarly referable to the sale of horses. If the purchaser gives what is called a *sound* price, that is, such as from the appearance and nature of the horse would be a fair and full price for it, if it were in fact free from blemish and vice, and he afterwards discovers it to be unsound or vicious, and returns it in a reasonable time, he may recover back the price he has paid in an action against the seller for so much money had and received to his use, provided he can prove the seller knew of the unsoundness or vice at the time of the sale; for the concealment of such a material circumstance is a fraud, which vacates the contract.

But if a horse is sold with an express warranty by the seller that it is sound and free from vice, the buyer may maintain an action upon this warranty or special contract without returning the horse to the seller, or without even giving him notice of the unsoundness or viciousness of the horse; yet it will raise a prejudice against the buyer's evidence, if he does not give notice within a reasonable time that he has reason to be dissatisfied with his bargain. *H. Bl.* 17.

The warranty cannot be tried in a general action of assumpsit to recover back the price of the horse. *Cowp.* 819: In a warranty it is not necessary to shew that the seller knew of the horse's imperfections at the time of the sale.

Note 10, page 452, line 12, words 30 *Geo. II. c. 24*.—And further regulated by statute 29 *Geo. III. c. 57*.

Note 11, page 453, line 16, words *call of the bailor*.—The learned Judge has classed indiscriminately together a number of bailments, which are very dissimilar in their nature and legal consequences. This subject forms a very important branch of the law of England. In order to acquire a knowledge of the numerous and nice distinctions which the law of bailments comprehends, it is necessary that the student should peruse with attention lord Holt's judgment in the report of *Cogs v. Bernard*, in *Lord Raym.* 909; and afterwards

Sir William Jones's Essay on the Law of Bailments, where these distinctions are examined and discussed, as I conceive, with not less learning and ingenuity than sound judgment and just conclusions.

Sir William Jones has reduced the law of bailments as it were to a scale, by which he limits the degree of neglect which every bailee is answerable for.

He divides neglect into three kinds, which he thus defines :

" Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.

" Gross neglect is the want of that care, which every man of common sense, how inattentive soever, takes of his own property.

" Slight neglect is the omission of that diligence, which very circumspect and thoughtful persons use in securing their own goods and chattels."

A carrier is liable even without any degree of neglect ; for from principles of public policy he is answerable if he is robbed of the goods ; and for every other loss, which does not happen by the act of God, (that is, without human agency) or by the king's enemies.

An inn-keeper, for the same reasons, is also liable for a theft or robbery of his guest's goods, committed in his house. See 1 vol. 446. n. 11.

But the agisting farmer, the taylor, and the pawnee, are answerable only for ordinary neglect ; so if a horse be sent to agist, and it be stolen, the owner cannot recover the value from the farmer as from a carrier and inn-keeper, unless he was stolen by the negligence of the farmer, as by leaving the gate of the field open ; or unless the farmer has expressly undertaken to be answerable for such a loss. *Law of Bailm.* 92.

A friendly depositary is responsible only for gross neglect ; and not even for that, if his character is known to the depositor, and he takes no better care of his own goods, and they also at the same time are spoiled or destroyed. *Ib.* 120.

Wherever a debt accrues to the bailee from the bailor, in consequence of the bailment, as where a horse is delivered to an inn-keeper to take care of, or to a farmer to agist, or to a farrier to shoe ; or where cloth is given to a taylor to make into a coat, or to a dyer to dye ; or corn to a miller to grind : in all such cases the bailee has, what is called, a *lien* upon the thing bailed, that is, he may detain it till the debt incurred by the bailment is discharged by the bailor.

But he has only a lien upon the article bailed for the debt, which accrues upon the last bailment of it, and he cannot retain it till the bailor has paid him a demand, which arose upon former bailments, where he restored the thing bailed without availing himself of his lien. 4 *Burr.* 2214.

Any person may be a pawnee ; that is, may take a pledge or pawn as a security for money lent, provided he takes no more than legal interest, 29 Geo. III. c. 57, s. 23. But if plate or any chattel is given to one person for life, and after his death to another, if he

who has the life-interest pawns the article for valuable consideration, the pawnbroker or pawnee has no lien upon it against the person who is entitled to the interest in remainder, although the settlement was concealed from the pawnee, and he was imposed upon by the person who pawned the article. 2 T. R. 376.

Note 12, page 453, line 22, words *both cases is the same*.—The learned Commentator has here followed lord Holt, who has treated a *commodatum* and a *locatio* without distinction. Lord Raym. 916. But this seems to be properly corrected by Sir W. Jones, 85; who concludes, that the hirer of a thing is answerable only for ordinary neglect; but that a gratuitous borrower is responsible even for slight negligence. *Ib.* 120.

Note 13, page 458, line 27, words *be totally lost*.—It is an established rule, that no contract is within the statute of usury, although more than five *per cent.* is to be paid upon money advanced, if the principal is actually put in hazard, and may be totally lost to the lender. The general nature of a respondentia bond is this, the borrower binds himself in a large penal sum, upon condition that the obligation shall be void, if he pay the lender the sum borrowed, and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The respondentia interest is frequently at the rate of forty or fifty *per cent.* or in proportion to the risk and profit of the voyage; for the respondentia lender may be considered as a material partner in the loss and gain of the adventure; and therefore he may insure his interest in the success of the voyage, but it must be expressly specified in the policy to be respondentia interest, 3 Burr. 1394; unless there is a particular usage to the contrary. Park. Inf. 11. A lender upon respondentia is not obliged to pay salvage or average losses, but he is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. *Ib.* 421.

Note 14, page 469, line 34, words *specie for the time*.—Insurance is in effect nothing more than a wager, for the underwriter, who insures at five *per cent.* receives five pounds to return one hundred upon the contingency of a certain event; and it is precisely the same in its consequences, as if he had betted a wager of 95*l.* to five, or nineteen to one, that the ship arrives safe, or that a certain event does not happen. So where a life is insured for a year at ten *per cent.*; that is, where ten pounds are received to pay one hundred, if a certain person dies within a year; this insurance is in effect precisely the same as a wager of nine to one, that the person, whose life is insured, lives a year. It is not surprising then that insurance should have become so prevalent and pernicious a mode of gaming, that the legislature was obliged to repress it, and to confine it within those limits, within which it is beneficial or absolutely necessary to the security of commerce. The writers of mercantile law, with that natural partiality which authors feel for their subjects, have amused themselves by endeavouring to dis-

cover what country could first claim the honour of the invention of insurance. But it is a contract far too simple, and too obvious to the understandings of mankind, however uncultivated, to be dignified by the name of invention. Yet its progress and refinements would be a necessary consequence of the extension of commerce, and the gradual improvement in the science of law.

Note 15, page 460, line 21, words *acts of parliament*.—The contract of insurance is founded upon the purest principles of morality and abstract justice. Hence it is necessary that the contracting parties should have perfectly equal knowledge or ignorance of every material circumstance respecting the thing insured. If on either side there is any misrepresentation or *allegatio falsi*, or concealment or *suppressio veri*, which would in any degree affect the premium, or the terms of the engagement, the contract is fraudulent and absolutely void. See various instances in *Pard's Inf. c. x.*

Note 16, page 461, line 2, words *respondentia bond*.—This statute does not extend to foreign ships, upon which, as before the statute, there may still be insurances, *interest or no interest*. These were not included in the act, on account of the difficulty of bringing witnesses from abroad to prove the interest. *Doug. 302*. But where there is an interest on board, the owner by a *valued policy*, in which the value of the goods is agreed upon and fixed between the parties, may insure far beyond the extent of the real value. For the excess of the insurance is held not to be within the statute, unless it should appear that the interest is so small as to be a mere evasion of the act, and a pretence for gaming. In an open policy, where no value is fixed, the prime cost of the goods must be proved. *2 Burr. 1170*.

A re-assurance is the contract, which an insurer, who wishes to be indemnified against the risk he has taken upon himself, makes with another person, by giving him a premium to re-assure to him the same event, which he himself has insured. Re-assurances are prohibited by the statute 19 Geo. II. c. 37. both upon foreign and English ships, unless the assurer is insolvent, a bankrupt, or dead, in which cases he, his assignee, or personal representative, may make a re-assurance, which must be expressly mentioned as a re-assurance in the policy. *2 T. R. 161*. The object of prohibiting re-assurance, was to prevent idle gaming speculations, by persons endeavouring to obtain a high premium for insurance, and then to secure themselves by getting the same risk insured at a lower rate. The learned Judge seems to have mistaken a double insurance for a re-assurance: a double insurance is where the owner insures his goods twice or *several times over*, with different underwriters, which he may lawfully do. By which means he increases his security, and though he cannot recover more than a single satisfaction for his loss, yet he may bring his action against any one of the underwriters, and compel him to pay the whole extent of the interest insured. And this underwriter may afterwards recover from each of the rest, a rateable satisfaction or apportionment of the sum.

which he has been obliged to pay to the assured. *Park Inf.* 280. The law of insurance is fully and ably collected and arranged by Mr. Park, in his *System of the Law of Marine Insurances*. For the benefit of students and of readers in general, the Editor, upon a future occasion, will give an abridgment of all the principles of this important and elegant branch of English jurisprudence.

Note 17, page 461, line 31, words *fee-simple*.—In fee-simple, or fee-tail, in possession of an annual value equal to the annuity.

Note 18, page 461, line 34, words *security itself*.—The consideration may either be in money or notes, if they are paid when they become due, but they must be specified in the memorial. 3 *T. R.* 298. But bank-notes are considered in this case as money. *Id.* 354. The grant of the annuity will be void if the consideration is partly money, and partly a debt for the sale of goods; for one great abuse intended to be corrected by the statute was a pretended advance of money by a fraudulent sale of goods. 1 *T. R.* 732.

Perhaps a debt for money lent would be a sufficient consideration within the spirit of the statute, yet it would be prudent not to trust to it. But annuities granted without a pecuniary consideration, as in consideration of the grantee's resigning his business in favour of the grantor, are excepted in the statute, and need not be registered. 4 *T. R.* 790.

Note 19, page 463, line 23, words *can be taken*.—This statute not only makes the lender liable to a penalty of treble the amount of the sum lent, but it declares all usurious bonds, contracts, and assurances, absolutely void. If therefore a bill of exchange, or note, is given in consequence of an usurious contract, it is absolutely void in the hands of an innocent person, who has taken it in the fair and regular course of business, without any notice of the usury; and evidence of the usury will be a good defence, in an action brought upon such a bill or note, against the drawer, acceptor; or any indorser. This is a very hard case; and the law is the same if a bill or note is given for a gaming debt, or for money lent to game with. *Doug.* 708. See further upon usury in the 4th vol. p. 158.

Note 20, page 466, line 18, words *by his authority*.—See 3 vol. page 159.

Note 21, page 467, line 29, words *between them*.—One very important distinction between foreign and inland bills of exchange still remains unaltered by the statutes; *viz.* in a foreign bill, in order to recover against the drawer or indorsers, it is necessary that the bill should be protested for non-acceptance or non-payment, 5 *T. R.* 239; but a protest is not necessary upon an inland bill, to enable the holder to recover the amount of it against the drawer or indorsers; and the only advantage of a protest upon an inland bill is to give the holder a right to recover interest and expenses incurred by the non-acceptance or non-payment. *Ed. Reym.* 993. No inland bill, payable at or after sight, can be protested; or which is not drawn payable at some time after date. 4 *T. R.* 170.

Note 22, page 472, line 8, words *after it*.—Every note or bill of that value shall specify the name and place of abode of the payee; it shall not be antedated, and shall be made payable within twenty-one days after date; and every indorsement shall be made within that time, and shall be dated when and where made, and shall contain the name and place of abode of the indorsee. The penalty for not complying with the statute is from 5 to 20*l.* at the discretion of a magistrate.

The following stamp duties are now payable upon all bills of exchange and promissory notes: upon all bills of exchange payable on demand, and promissory notes payable to bearer on demand, for 5*l.* 5*s.* and under, 3*d.*; for 30*l.* and under, above the last sum, 6*d.*; for 50*l.* and under, 9*d.*; for 100*l.* and under, 1*s.*; for 200*l.* and under, 1*s.* 6*d.*; these may be re-issued at the place where drawn. But such bills or notes paying for 3*l.* 5*s.* or under 6*d.* and for 30*l.* and under, above 5*l.* 5*s.* one shilling, may be re-issued after payment at one place. For all other bills and notes the following duties must be paid: for 30*l.* and under, 6*d.*; for 50*l.* and under, above the last sum, 9*d.*; for 100*l.* and under, 1*s.*; for 200*l.* and under, 1*s.* 6*d.* Every bill and note above 200*l.* shall pay 2*s.* No duty is to be paid upon bills or notes for less than 40*s.*; nor upon any draft on demand upon bankers living within ten miles of the place where drawn. All foreign bills shall pay for each set, for 100*l.* and under, 6*d.*; for 200*l.* to 100*l.* nine pence; above 200*l.* one shilling. 31 Geo. III. c. 25. *Burr. Prom. Note.*

Note 23, page 469, line 6, words *back of the bill*.—It is fully settled, that a verbal acceptance will bind the drawee. *Str. 1000.* Yet it appears from the statutes, which are very far from being so intelligible as the importance of the subject demanded, that if the drawee refuses to accept in writing, the bill may be protested for non-acceptance. 3 & 4 Ann. c. 9. s. 4. But if a verbal acceptance is received by the holder, the bill cannot afterwards be protested for non-payment, so as to charge the drawer with costs, damages, and interest, in consequence of the protest. s. 5.

Note 24, page 469, line 20, words *fourteen days after*.—See note 26.

Note 25, page 469, line 23, words *becomes due*.—A bill or note is not now considered due or demandable till the last day of the three days grace; as if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month after date, payment must be demanded on the 25th, the 22d of the same, and on the 15th of the next month respectively. Days of grace are allowed upon promissory notes, in like manner as upon bills of exchange. 4 T. R. 148.

Note 26, page 470, line 11, word *drawee*.—It is probable, when the statute 9 & 10 W. III. c. 17, was passed, which requires notice of a protest to be sent within fourteen days, that such time was thought a reasonable notice of the bill's being dishonoured; but it is now fully settled, that if the holder of a bill intends to have his remedy against the drawer or indorser, he must give him notice

without delay of the non-acceptance or non-payment, and that he expects payment from him. It used to be held, that the reasonableness of the notice was a question of fact for the jury to determine; but it is now so far a question of law, that the courts will grant new trials till the jury adopt the rule which they have established; which seems to be this, *viz.* that notice must be given to the drawer or indorser, by the first or next post, if the time will permit, after the dishonour of the bill. 1 T. R. 168. Doug. 497. It might perhaps be more convenient to extend the rule till the post goes out on the next day, as this would cut off all questions and litigation upon the possibility of giving notice on the same day. The drawer and indorsers are discharged, without such due notice, from all actions brought upon the bill; with this exception, if the holder can prove that the drawer had no effects in the hands of the drawee when the bill was dishonoured, he may still recover against the drawer, though he omitted to give him notice. For the intent of the notice is to give him the earliest opportunity of regaining his property out of the hands of the drawee; and he can sustain no possible injury by the want of notice, when he has no property in the drawee's possession. 1 T. R. 712. But this reason does not extend to an indorser; and therefore the circumstance of the drawee's having no effects is immaterial in an action against him. *Id.*

Note 27, page 470, line 24, words *but the drawer only*.—The holder of the bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill; but he may sue out execution against all the rest for the costs of their respective actions. Bayley, 43.

This important subject will be more fully discussed by the Editor upon a future occasion.

CHAPTER THE THIRTY-FIRST.

Of Title by Bankruptcy.

Note 1, page 471, line 21, words *criminal or offender*.—Throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt laws appears to have been to prevent and defeat the frauds of criminal debtors; for the 34 & 35 Hen. VIII. c. 4, the first bankrupt statute, begins with this preamble—"Whereas divers and sundry persons craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience." The bankrupt being deemed an offender, and being completely divested of the disposition of his property, these statutes at the first would naturally be considered penal statutes; for this reason I presume the 21 Jac. c. 19, begins by declaring that "the aforesaid statutes shall be

"largely and beneficially construed and expounded for the aid and relief of the creditors."

Note 2, page 474, line 29, words *in England*.—But that statute extended to persons of every denomination who came under the description of the preamble, which see in the preceding note (1). By that statute the chief officers of state, the chief justices, the privy council, or three of them at the least, had the authority which is now given to the commissioners of bankrupt, to distribute the bankrupt's property among his creditors. It is something remarkable, that, although the subsequent statutes describe what traders shall be bankrupts, and the conduct which renders them subject to the bankrupt laws, and give commissioners appointed by the chancellor authority over *such persons*, yet I have so where found any negative words, or words to repeal the stat. of Hen. VIII. The authority in that statute is left to the discretion of the high persons therein named; and as the object was supposed, as I conceive, to have been sufficiently answered by the subsequent statutes, it fell into entire disuse.

Note 3, page 475, line 4, words *concerned as natives*.—Any person, whether native, denizen, or alien, who trades to England, although he never resides here as a trader, may be a bankrupt, if he should come to England and commit an act of bankruptcy whilst he is here. *Corp.* 398.

Note 4, page 475, line 16, words *deemed a bankrupt*.—Although a farmer, grazier, and drover, cannot from their respective occupations alone be bankrupts, yet if they buy and sell, or are dealers, independently of these characters, they become, like other traders, subject to the bankrupt laws: as one farmer was declared a bankrupt who bought large quantities of potatoes, not for planting or consuming upon his farm, but for selling again for profit, 1 *Str.* 513; and another, who occasionally bought horses, not for the use of his farm, but to make a profit of by reselling. 1 *T. R.* 517. A farmer who makes upon his farm bricks for sale, from earth not taken from the farm, may be a bankrupt. 1 *Bro.* 173. But where a man rented a farm, wherein there was a brick-ground, upon which he dug the clay and manufactured bricks for sale, the court of common pleas decided he could not be a bankrupt; but this judgment was afterwards reversed by the court of king's bench. 1 *T. R.* 32. *Cooke*, 52. 3d Edit.

Note 5, page 476, line 13, words *a bankrupt*.—An inn-keeper may be a bankrupt, if he sell liquor out of his house to all persons who send for it, however inconsiderable the quantity, or small his profit. 1 *T. R.* 517. And by this species of dealing, it is probable that all inn-keepers are now traders, and liable to be made bankrupts.

Note 6, page 471, line 11, words *commission of bankruptcy*.—But if a single woman carries on a trade and commits an act of bankruptcy, she cannot after marriage be made a bankrupt. *Cooke*, 40. Where a married woman lives apart from her husband, under articles of separation, with a separate maintenance, as she is competent to

contract, and liable to be sued and taken in execution for her debts as a *feme sole*, if she becomes a trader, it is reasonable, and agreeable to principles, that she should be subject to the bankrupt laws. *Cooke*, 30. 3d Edit.

Note 7, page 478, line 3, words *defraud his creditors*.—It seems to be determined, that if a trader departs the realm, whatever may be the reason for it, and if in his absence any of his creditors are denied payment of their debts, it is an act of bankruptcy. *Cooke*, 92. This, to say no more of it, is a harsh construction: if then a merchant is under the necessity of going abroad, he must be very careful to arrange his affairs in such a manner, that all the demands of his creditors during his absence may be instantly satisfied.

Note 8, page 478, line 9, words *pretext of the law*.—A denial that the trader is at home, when in fact he is, by his order or approbation, to a creditor or his servant, who comes to demand payment of a debt, is *prima facie*, and is generally admitted, evidence of this act of bankruptcy; yet if the denial were made not to delay payment, but for some other cause, as sickness, company, business, or the unseasonableness of the hour, it does not amount to an act of bankruptcy. All the acts of bankruptcy being voluntary acts in the bankrupt, except lying in prison for two months, or neglecting to make satisfaction within the same time after service of legal process, where the trader has privilege of parliament, which acts of bankruptcy may be compulsory and unavoidable; the consequence is, that most bankruptcies are previously concerted by the trader and some of his creditors; yet it is held, if any creditor, who has concerted the bankruptcy with the trader, comes or sends for payment, and a denial is made, this is not an act of bankruptcy; for the trader cannot be said to keep house to delay a creditor, who sends not for payment, but for refusal of payment. But if any other creditor, who is not privy to this agreement and design, sends for payment, and a denial is made, this is a complete act of bankruptcy. *Cooke*, 93.

Note 9, page 478, line 16, words *of their security*.—A fraudulent judgment and execution, though void against creditors, do not constitute an act of bankruptcy; the words in the statute 1 Jac. I. c. 15. signify the peculiar manner of carrying on suits in London and some other places. *Cowp.* 417.

Note 10, page 478, line 19, words *nature with the last*.—A fraudulent conveyance or sale of goods by a trader, is not an act of bankruptcy, unless it is by deed. 4 *Burr.* 2478. A grant or assignment of all a trader's property is an act of bankruptcy. *Doug.* 282. And even an assignment by a trader of all this property in trust for his creditors, is an act of bankruptcy; unless they all concur, being contrary to the policy of the bankrupt laws. But the creditors who are parties, or assenting to such an assignment, cannot avail themselves of it, and establish it as an act of bankruptcy. *Cooke*, 108. 2 *T. R.* 594. A conveyance by deed of part of the effects, if made in contemplation of bankruptcy, is also an act of bankruptcy.

cy. *Doug.* 86. But where there is a conveyance without deed, or a payment of money, or any preference is given, although to a *bonâ fide* and meritorious creditor, upon the eve and expectation of bankruptcy, this is a fraud against the bankrupt laws, and may after bankruptcy be avoided by the assignees, for the benefit of the creditors in general. *Cowp.* 127. 629.

Yet if such a preference to a particular creditor be not given voluntarily, but from an apprehension of legal process, it is not fraudulent, and cannot afterwards be vacated. 1 *T. R.* 155.

Note 11, page 478, line 31, words *obtain his liberty*.—In this case, the act of bankruptcy relates back to the day upon which the arrest is made. 2 *T. R.* 143. And the legal consequences will be the same as if the trader had committed any other act of bankruptcy on that day. But if a trader upon being arrested, puts in bail, and afterwards surrenders himself in discharge of his bail, and lies two months in prison, the act of bankruptcy is committed on the day of the surrender. *Bull. N. P.* 38.

Note 12, page 479, line 7, words *privilege of parliament*.—A member of either house of parliament who engages in trade, and commits an act of bankruptcy, may be declared a bankrupt, if, within two months after service of process sued out as described by the statute, he does not compound or pay the debt, or enter into a bond with two sureties to be approved of by a judge of the court, to pay the sum recovered in the action with costs.

Note 13, page 479, line 13, words *or implication*.—There is one act of bankruptcy besides those enumerated above by the learned Commentator, viz: If any bankrupt shall give or secure to the person who has sued out a commission, more in the pound than the other creditors can receive, that commission shall be superseded, and this alone shall be an act of bankruptcy to support another commission. 5 *Geo. II. c.* 30. f. 24. And if a trader gives a satisfaction to a petitioning creditor, who has sued out a commission, which induces him not to prosecute it; this is held to be an act of bankruptcy which will support a second commission. *Cooke*, 120.

Note 14, page 479, line 30, words *he is become a bankrupt*.—Bankruptcy and insolvency, though frequently confounded in common discourse, yet are very different in the consideration of law. Bankruptcy can happen to no one who is not a trader, and every trader, by committing any of the acts already enumerated, may be a bankrupt, though he may be worth one hundred thousand pounds after the payment of all his debts; and if a trader or merchant openly appears in his shop or counting-house, and tells his creditors, I cannot pay you, or, I will not pay you, no commission can be sued out against him till he has done some act which the law denominates an act of bankruptcy.

Note 15, page 480, line 5, word *affidavit*.—The petitioning creditor's debt must be a legal not an equitable demand, and consequently the assignee of a bond cannot take out a commission. If a debt is due from a partnership, it will be sufficient to support a separate commission against one partner only. The petitioning

creditor's debt must be contracted, either before the bankrupt began, or before he left off trade. If a note or bill is drawn before the act of bankruptcy, but indorsed without fraud afterwards, the indorsee has the same right to petition for and to prove it under the commission as the original payee. The holders of bonds, bills, notes, and other securities for the payment of money, or in consideration of goods sold upon credit, may petition for a commission, before such securities are due, by the 5 Geo. II. c. 30. s. 22. If a creditor has taken his debtor in execution, he cannot afterwards sue out a commission, for the execution is considered in law a satisfaction of the debt. It is now held to be necessary to support a commission and the proceedings under it, that the petitioning creditor's debt should have existed prior to any act of bankruptcy proved. See *Cooke, ch. ii.*

Note 16, page 480, line 10, words *do not prove him a bankrupt*.—When a creditor intends to take out a commission, he must make an affidavit of his debt, and execute a bond to the great seal; (this is called *striking a docket*) and if he does not get the commission sealed within four days, exclusive of the day upon which the docket is struck, any other creditor may sue out the commission. *Cooke, ch. i.* By a late order of lord chancellor Loughborough, if the commission is to be executed in London, it shall be superfedable for want of prosecution at the expiration of fourteen days after the date thereof; and if it is to be executed in the country, at the expiration of twenty-eight days after the date thereof; and the first application by any solicitor on the day after the time limited for a superfedas and a new commission shall be preferred to that of the solicitor who sued out the superfedable commission. 4 Bro. 432.

Note 17, page 480, line 23, words *at every sitting*.—The three commissioners who attend the execution of a commission are allowed 20s. each for every meeting in that commission, and by a late order of the chancellor, they cannot adjourn the meeting to another hour on the same day, so as to entitle themselves to a fresh fee. They are allowed also 20s. each for every assignment and bargain and sale they execute, and the same for signing a certificate for a superfedas and the certificate of the bankrupt's conformity.

The statute only allows 20s. for each meeting, but as the commissioners used formerly to meet merely to examine a deed, or the proceedings upon which they granted a certificate, they are now allowed to take distinct fees for them, although they sign them at a meeting held for the proof of debts, choice of assignees, or any other purpose. These, with half a guinea, if a commissioner acknowledges the bargain and sale in the court in which it is enrolled, are all the fees, which the commissioners either in London or the country are justified in taking.

Note 18, page 480, line 28, words *bankruptcy*.—The first inquiry is the amount and nature of the petitioning creditor's debt. And the commissioners ought not to admit the proof of this debt upon deposition transmitted to them, unless the petitioning creditor

lives at a distance, or a satisfactory reason for his non-attendance is assigned and sworn to by an affidavit. The time ought to be specified in the deposition of the witness who proves the act of bankruptcy; for upon the death of the witness after the proceedings are recorded, the deposition will be evidence in any court of justice. *Doug.* 244. The declarations of the party before he is adjudged a bankrupt are evidence, but they are not alone sufficient to prove an act of bankruptcy; yet if his absconding or keeping house is proved by other evidence, his declarations will be admitted to shew his reasons for it, and thus to complete the evidence of the act of bankruptcy. The act of bankruptcy may be committed after the party has discontinued his trading. *Cocks*, 91—2. Neither the trading nor act of bankruptcy can be proved by a creditor.

Note 19, page 481, line 6, words *lord chancellor*.—The chancellor may order the time to be enlarged fifty days, to be computed from the day fixed for the third meeting; but the order must be made six days before that day. The order is generally made upon a petition in the name of the bankrupt, and upon condition that he surrenders himself on the day appointed, between the hours of ten and one in the morning. This order is never denied, where it is thought necessary to be at the expense of making the application.

Note 20, page 482, line 15, words *and cut off*.—There are instances of convictions and executions of bankrupts for not surrendering, and for concealment of their effects, *Green*, 208; but I never read of any prosecution for this offence.

Note 21, page 483, line 2, words *their hands and seals*.—The commissioners may at their discretion; as well as the creditors, refuse to sign the certificate; but after it is signed by the commissioners, notice is to be given in the Gazette that it will be allowed by the chancellor, unless cause is shewn to the contrary within twenty-one days. And if within that time any petition is presented by a creditor to the chancellor for that purpose, the allowance is stayed till the bankrupt can answer the allegations, and the chancellor has an opportunity of considering the validity of the objection. If the number of creditors is less than five, all must sign as four-fifths of four are three and one-fifth of another; and wherever there is a fraction, of necessity a whole creditor must sign. And this is true of every other not exactly divisible by five.

Note 22, page 484 line 2, words *previous proceedings*.—That is, in an action brought against the bankrupt for a debt due before the bankruptcy, unless the plaintiff can prove a concealment by the bankrupt to the amount of 10*l.* or that the certificate was obtained by fraud. 5 *Geo. II. c. 30. s. 8.*

Note 23, page 484, line 8, word *extravagant*.—The bankrupt is discharged by his certificate from all debts which could have been proved under the commission, but he is still liable to make a repay-

ation in damages for all torts or injuries done by him before the bankruptcy; for these could not be proved, as the extent of the damages must be ascertained by a jury. Hence also he is not discharged from any breach of covenant; and even where he covenants for payment of rent, although the lease and premises are disposed of by the assignees for the benefit of the creditors, the bankrupt still remains liable to be sued by the landlord upon his covenant. 4 T. R. 94. This is a hard case, for the landlord has his remedy also against the tenant in possession. The bankrupt is not discharged from any contingent debts, where the contingency happens after the bankruptcy: these are debts which originate from something done previous to the bankruptcy, but which become absolutely debts at some period subsequent to it. As when one man is surety for another, the principal is not indebted to the surety till his surety is obliged to pay the debt for him. Therefore if this does not happen till after the bankruptcy, the surety cannot prove his debt under the commission; and of consequence, the bankrupt is not discharged by the certificate. But it is determined that, if the principal gives the security an absolute unconditional bond as an indemnity, he may prove it under the commission, though he has never been called upon to pay the debt of the principal. 2 T. R. 640. Yet in such a case it must be presumed that the surety would be restrained from receiving under the dividend more than he had actually been compelled to pay, or from receiving any thing at all till he was actually damaged. In analogy to the contingent debts of sureties, I conceive two cases have lately been determined, one in the common pleas upon a bill of exchange, *H. Bl. Rep.* 640; the other in the king's bench upon a promissory note, 4 T. R. 714. In each case the payee was obliged to take back the bill or note, and to pay the value of it after the bankruptcy of the drawer; against whom he afterwards brought an action, who pleaded his bankruptcy and certificate in bar; but the courts held in the respective cases, that the bankrupt was not discharged by the certificate. But in both these cases it may be collected from the reports, that they were merely accommodation bills, that the payees had given no value before the bankruptcy, that they had lent their names merely as sureties, and of consequence, that the bankrupt was not indebted to them till they had been obliged to pay the amount of these bills. This circumstance is so slightly stated in each report, particularly in the latter, as to induce many readers to suppose that no indorser, who is obliged to take back a bill or note after the bankruptcy of the drawer or acceptor, can prove it under his commission. But I apprehend the courts never intended to say that a holder of a bill, who has given full value for it before the bankruptcy of the drawer or acceptor, and is obliged to take it back after his bankruptcy, cannot prove it under the commission; a debt is due to him before the bankruptcy, which cannot be affected or disturbed by the subsequent assignment and re-assignment of the bill. It has been determined, that the assignment relates to the original debt, and the assignee stands in his place. *Cooke*, 25. Hence an indorsee without notice, after the issuing of

the commission, ought to be admitted to prove, and have relief under the commission.

Note 24, page 485, line 2, words *implements of their trades*.—If they do not pay fifteen shillings in the pound under the second commission, the second certificate is no bar to an action or execution against their future effects. 5 T. R. 287.

Note 25, page 485, line 26, words *to recover it*.—And it has been decided after much serious argument, that the assignment of the commissioners conveys the bankrupt's personal property and interests, which are out of the kingdom at the time of bankruptcy and assignment. 4 T. R. 182.

And by the assignment the property is so completely vested in the assignees, that the bankrupt is not entitled to receive from his estate even the necessary subsistence of himself and family, but by the favour and indulgence of the assignees and creditors. 1 T. R. 157.

Note 26, page 485, line 33, words *equivocal act may be*.—The court of king's bench have gone so far in holding that a clear unequivocal act of bankruptcy cannot be wiped away by any subsequent conduct, as to decide, that if a merchant is denied in a morning, when a holder of a bill comes for payment, it is an irrevocable act of bankruptcy, even though he should pay the bill in the course of that day, before it could be protested, or he could be sued upon it. 2 T. R. 59. This is a severe case; and it has rather the appearance of a *petitio principii* to pronounce it an unequivocal act of bankruptcy. A denial is not of itself an act of bankruptcy, but only evidence of one; viz. a beginning to keep house with intent to defraud and hinder creditors; and where a debtor prevents his creditor from being hindered for a moment after he has a right to demand payment, ought we not in candour and justice to presume that he never had that intent? Indeed, in such a case it is not improbable that the denial was merely for the purpose of procuring the means of discharging the debt.

Note 27, page 486, line 14, words *are bound thereby*.—The king not being expressly named in the bankrupt statutes, is held not to be bound by them, 2 Str. 982; and therefore an extent will bind the property of the bankrupt, if it is issued before the actual assignment of the commissioners; which assignment, by changing the property, defeats the subsequent process of the crown. When therefore it is apprehended the bankrupt is indebted to the crown, the commissioners execute immediately a provisional assignment, by which means the crown will be entitled to no more than an equal share with the other creditors. If the extent and the assignment bear date on the same day, the extent shall be preferred. Park. Rep. 126. Green, 126.

Note 28, page 486, line 25, words *to be refunded*.—This statute extends its protection to the creditor of the bankrupt in two instances only, viz. when he has received payment, without notice of the bankruptcy, either for goods sold, or for a bill of exchange, which in the usual course of trade the bankrupt is liable to pay.

And it has been determined, that a creditor was compellable to refund, who had given further time to the bankrupt when a bill became due, at his request, and upon a promise to pay interest, and who afterwards received the amount of it with interest, without any notice that the debtor had committed an act of bankruptcy; for the court held this to be the payment of a loan, and not of a bill. 2 T. R. 648. So also a creditor has been obliged to refund money paid by a trader, after a secret act of bankruptcy, for the carriage of goods. 5 T. R. 197.

Note 29, page 486, line 28, words *account for it again*.—If a debtor pays the debt to a trader, with the knowledge of an act of bankruptcy committed by him, if afterwards a commission issues, he may be compelled to pay it over again to the assignees; as where a bankrupt pays a trader's drafts, after knowledge of an act of bankruptcy. 2 T. R. 113.

But he will not be liable to repay it, if he pays it after a judgment obtained without fraud. 2 T. R. 482.

Note 30, page 486, line 36, words *part of them in value*.—In all meetings of creditors under the statute, the determination is to be made by the major part in value; number seems never to be regarded but in signing the certificate. The assignees may bring actions at law without consulting the creditors.

Note 31, page 487, line 6, word *distribution*.—The notice is to be given by an advertisement in the London Gazette.

Note 32, page 487, line 5, words *if required*.—At a meeting of the first dividend, the assignees are seldom required by the commissioners or creditors to verify their accounts upon oath, but the dividend is ordered upon their *admission* that they have recovered property to a certain amount; but upon making a final dividend, the oath of the assignees cannot be dispensed with.

Note 33, page 487, line 18, words *goods in execution*.—When a creditor proves his debt, he states in his deposition either that he has received no security, or what the security is.

If he has a security and wishes to prove and receive a dividend, he must deliver up the security for the benefit of the creditors, unless it is a joint security from the bankrupt and another person, and then he may receive a dividend upon the whole due at the time of the deposition, and may have recourse to the co-surety besides; provided he does not receive more than 20s. in the pound for the whole debt. But every security, which the creditor has in his possession, must be exhibited to the commissioners when he proves his debt. If a creditor, having received the whole of his debt, from a surety, or from another party upon a bill of exchange, should afterwards conceal this circumstance and take a dividend under a bankrupt's estate, it would be a fraud which I am sure would be punished, as it ought to be, in the most exemplary manner. I particularly mention this from having had occasion to observe the great number of debts proved under commissions of bankrupt, where there were solvent parties, who from the nature of the transaction ought to

have been first called upon to discharge the debt; and this fraud may be more easily practised, from the commissioners and assignees having no opportunity of examining these creditors afterwards upon oath, unless a special meeting is held for the purpose. It can only therefore be recommended to the assignees, to make diligent inquiry into the conduct of these creditors with regard to such debts, and when they discover such a fraud to be attempted or practised, to bring the offender to the shame and punishment he so justly deserves.

If a creditor proves an aggregate debt, and states more than one security; for instance, two or more bills or notes; if he receives the value of any one of them in full, so much at the time of the dividend must be deducted from the amount of the debt proved. *Cooke, 195.* Where a creditor has a mortgage or pledge, which he thinks insufficient to satisfy the whole of his debt, he may petition the chancellor to have it sold, and the produce of it to be applied in diminution of the debt, and to prove the deficiency under the commission. *Cooke, 149.*

Note 34, page 487, line 26, words *other creditors*.—Lord Bathurst chancellor declared expressly, that this proposition in the Commentaries was erroneous, and decreed that a landlord, if he has not availed himself of his right to distrain, has no privilege under the bankrupt statutes, but must come in *pari passu* with other creditors for every part of the rent due to him. *Cooke, 222.*

Yet a landlord may distrain for all the rent due, even after a provisional or absolute assignment, while the goods continue upon the premises. *1 Atk. 103.*

Note 35, page 488, line 9, words *drawback in proportion*.—The whole of such a debt must be proved, and if it is not payable when a dividend is declared, the discount for the time which is then to run, must be deducted from the whole sum, and the creditor shall be allowed a dividend upon the remainder.

Note 36, page 488, line 14, words *act of bankruptcy*.—Where an obligor in a bottomry or respondentia bond, or an underwriter, becomes a bankrupt, the obligee and the assured shall be permitted to claim; and after the contingency happens upon which the bond is due, or upon the loss of the ship, or other event against which the insurance is made, they shall be admitted to prove, as if these events had happened before the bankruptcy. *19 Geo. II. c. 32.*

Note 37, page 488, line 17, words *by the first*.—If a creditor has not proved before a second dividend, it is now the practice of the commissioners, to receive the proof of his debt, without an order from the chancellor, and to admit him to be paid equally with the rest of the creditors, if there is sufficient property left in the hands of the assignees, and then to direct an equal distribution of the residue. *Cooke, 589.*

Note 38, page 488, (last line) words *on his representatives*.—Bills and notes, in which interest is not named, carry interest only between the protest and the date of the commission.

CHAPTER THE THIRTY-SECOND.

Of the Title by Testament, and Administration.

Note 1, page 497, line 7, words *even four*.—This has been thought an error of the press, and that four by mistake was printed for fourteen. See this subject learnedly investigated by Mr. Hardgrave, who concludes with the learned Judge, that a will of personal estate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not sooner. *Harg. Co. Litt.* 99.

Note 2, page 497, line 20, words *disability lasts*.—But if a person of sound mind makes his will, this will is not revoked nor affected by his subsequent insanity. 4 Co. 61.

Note 3, page 498, line 1, words *devising lands*.—See page 379, note 1, *ante*.

Note 4, page 498, line 13, words *properly his assent*.—Where personal property is given to a married woman for her sole and separate use, she may dispose of it by will without the assent of her husband. 3 Bro. 8.

Note 5, page 549, line 4, words *vacates the will*.—And it cannot be revived by the subsequent death of her husband. 2 T. R. 695.

Note 6, page 502, line 33, words *state of celibacy*.—Marriage, and the birth of a posthumous child, amount to a revocation of a will made previous to the marriage. 5 T. R. 49.

Note 7, page 503, line 9, words *beir a shilling*.—This, I conceive, seldom proceeds from ignorance, but in general is the last effusion of an unforgiving spirit, desirous of leaving an insult upon record, when it has ceased to produce either injury or disappointment.

Note 8, page 504, line 28, words *real estates*.—See page 228, note 12, where the Editor endeavours to shew that the canon law computation is of no avail whatever in the descent of real estates.

Note 9, page 506, line 3, words *of the crown*.—Where a bastard dies intestate without wife or issue, the king is entitled to his personal property as administrator; but it is usual for the crown to grant the administration of it to some relation of the bastard's father or mother, reserving one-tenth or other small proportion of it. 1 Wood. 398.

Note 10, page 507, line 10, words *before he proves the will*.—He may commence an action, but he cannot declare in the action, before probate; for when he declares, he must produce in court the letters testamentary. And he may release or pay a debt; may assent to a legacy, and be sued before probate; and do other acts, which seem to be fully enumerated in 1 Salk. 299, and *Com. Dig. Admin.* B. 9.

Note 11, page 508, line 6, words *his own debt*.—It is held, that the least intermeddling with the effects of the intestate, even

milking cows, or taking a dog, will constitute an executor *de facto*. Dy. 166. An executor of his own wrong will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. 3 T. R. 590. 2 T. R. 100.

Note 12, page 511, line 3, words *made upon him*.—The goods of a testator, in the possession of the executor cannot be taken in execution of a judgment in an action brought against the executor in his own right. 4 T. R. 621.

Note 13, page 511, line 18, word *recognizance*.—To this class of debts must be added a decree of a court of equity. 3 P. Wms. 401.

Note 14, page 511, line 21, words *under seal*.—A court of equity will order voluntary bonds or other special contracts, without consideration, to be postponed to simple contract debts. 3 P. Wms. 222.

Note 15, page 512, line 12, words *notice of the debt*.—After a suit is commenced, the executor or administrator may still give a preference to other creditors of the same degree, by confessing a judgment to them for the real amount of their debts. 1 P. Wms. 295. But after a bill is filed by a creditor for a discovery of assets and payment of his debt, the executor or administrator may pay another creditor of equal degree without confessing a judgment. 3 P. Wms. 401.

The course of administration or payment of the debts according to their priority applies only to legal assets; but as natural equity requires that all the creditors of the testator should be paid equally, when therefore the testator leaves his real estates to trustees or to executors, who thus become trustees for the payment of his debts, these are called equitable assets, because a court of equity will order all the creditors to be paid *pari passu*, or an equal share out of this fund. 1 Bro. 138. 2 Atk. 30.

And even where specialty creditors have received part of their debts out of the personal estate, a court of equity will restrain them from receiving any part of the equitable fund, till all the other creditors are paid an equal proportion of their debts. 3 P. Wms. 322.

The personal estate is said to be the natural fund for the payment of debts; yet it will be exonerated if the testator leaves by his will sufficient real property for the payment of his debts, provided it is the manifest intention that the personal estate shall be exonerated, and that the real estate shall be alone applied to that purpose. 1 Bro. 462. 2 Bro. 60.

If lands descend to the heir charged by the testator with his debts, there it shall be liable to all his debts, although it shall be considered as legal assets, and they shall be paid according to their priority. 2 Atk. 290. 1 P. Wms. 430. The equity of redemption of lands, mortgaged in fee, is equitable assets; for the creditors can have no relief from it but in a court of equity. 2 Atk. 290.

All specialty creditors, where the testator has bound himself and his heirs, have their election, whether they will resort to the heir,

who has lands by descent, or to the executor, for payment of their debts; and although a court of equity will not interpose its authority, and compel the specialty creditors to apply to the heir, yet if they exhaust the personal fund, or leave insufficient for the discharge of the simple contract creditors and legatees, it will enable these to stand in the place of the specialty creditors, and to recover from the heir at law the amount of what they have drawn out of the personal fund. 1 *Vz* 321. This is called marshalling the assets. If a person mortgages an estate and dies, the heir at law shall have the estate exonerated, or the mortgage discharged by the personal representative out of the personal estate, provided it does not interfere with other debts and legacies, for the personal estate has been augmented to that extent in consequence of the mortgage; and therefore the heir at law shall not have the benefit of the personal estate to discharge a mortgage, which was not brought upon the estate by the testator or intestate. 2 *Cox's P. Wms.* 664. 2 *Bro.* 101.

If a testator having mortgaged an estate devises it by will, and permits other lands to descend to his heir, the devisee shall have the estate devised to him exonerated out of the personal estate, and if that is insufficient by the heir at law. 2 *Atk.* 430.

Note 16, page 512, line 25, words *of the executor*.—If an executor, in consideration of assets of the testator in his possession, promises to pay a legacy to the legatee, an action of assumpsit may be brought against him in his own right. *Cowp.* 284. 289.

Note 17, page 513, line 19, words *solvendum in futuro*.—If the legacy is given when, or if the legatee attains a certain age, or to him at that age, the time is said to be annexed to the substance of the legacy, and it is not vested or transmissible to his representatives if the legatee dies before that age; but if it is payable at that age, or when, or if he attains it, the time is said to be annexed to the payment only; and the legacy is vested and transmissible though he should die without ever arriving at that age. 2 *Atk.* 128. This is a trifling distinction, and understood or attended to by few testators, who make their own wills. If the testator gives a legacy without referring the time to the payment, it will notwithstanding be vested, if he gives the interest until that time. 2 *Bro.* 3. But this rule will not extend to a maintenance less than the interest. 3 *Bro.* 416. But if lands are devised, when the devisee attains a certain age, the interest in the estate will be vested, and upon the death of the devisee before that age, will descend to his heir. 3 *T. R.* 41.

Note 18, page 513, line 22, words *legatee had lived*.—But where a legacy is given to another, in case the first legatee dies under twenty-one or a certain age, the legacy must be paid upon the death of the infant. And where it is not given over to another, if it bears interest, his representative shall be entitled to it immediately; but if the interest allowed by the testator is less than the interest allowed by a court of equity, the executor of the testator shall be entitled to the difference until the first

legatee would have arrived at the age prescribed by the testator. 2 P. Wms. 478. 1 Bro. 105.

A bequest of a residue or fund to all the children of A, to be paid when they shall attain the age of twenty-one, must be divided among those only who are in existence, when the eldest attains that age. 3 Bro. 404.

Note 19, page 513, line 34, words *no concurrent jurisdiction*.—It is generally true, that both portions created by deed or will, and legacies which are to be raised out of real property, and to be paid upon a future day, shall never be raised if the person to whom they are given dies before the day of payment. But legacies and portions in a will shall be raised, if the time of payment is postponed on account of the circumstances of the testator's estate, and not on account of the circumstances of the legatee; or where it is the apparent intention of the testator, notwithstanding the death of the legatee prior to the time specified. If the portions are to be raised out of the land, and no time is limited, although the cases upon the subject are contradictory, it seems they shall sink into the estate, if the children die before they are wanted. See the cases upon this subject fully collected in 2 Cox's P. Wms. 612, and Harg. Co. Litt. 237.

Note 20, page 514, line 3, words *of the testator*.—A pecuniary legacy, given by a parent to a legitimate child, shall carry interest from the death of the testator; otherwise the child might perish within the year for want of maintenance, 1 Ves. 310.

Note 21, page 514, line 12, words *in case of his decease*.—There may be a *donatio causa mortis* of bonds, bank-notes, and bills, payable to bearer, but not of other promissory notes or bills of exchange, these being choses in action which cannot pass by a delivery; 3 P. Wms. 357. and 2 Ves. 431, where this subject is largely discussed by lord Hardwicke.

Note 22, page 515, line 6, words *as an administrator*.—Courts of equity now construe executors to be trustees for the next of kin in all cases, where a fair inference can be collected from the expressions and circumstances of the will, that such was the testator's intention. Where a legacy is given to a sole executor, it affords a reasonable conclusion, that the testator intended to give him this alone as a satisfaction and recompense for his trouble; for it would be absurd to give him expressly a part, if it were intended that he should have the whole, or, according to a quaint phrase, he cannot take all and some. And this inference is not repelled where a wife is the executrix, or the next of kin has also a legacy. But, an exception out of a legacy in favour of an executor, does not raise such an implication as to exclude him from the benefit of the residue; as where the use of a service of plate is given to the executor for his life, and after his death it is bequeathed to another, for such an exception is perfectly consistent with the bequest of the residue, and the executor could not have had the benefit of the exception without a special description of it. So also where a legacy is given to one of two or more co-execu-

cort, or where unequal legacies are given to co-executors, they shall take the residue, for this might be done by the testator not in favour of his next of kin, but with an intent to shew a preference to one above the others. See these distinctions; and the authorities, fully and clearly collected and stated in 1 Cox's P. Wms. 550.

If the testator gives the *residuum* to a person who dies in his lifetime, in consequence of which this bequest is lapsed, the executor, though he has no legacy, shall be a trustee for the next of kin, because the testator has expressed a manifest intention not to give it to his executor. 3 Bro. 28.

And it is probable that now the same would be held of every lapsed legacy and interest.

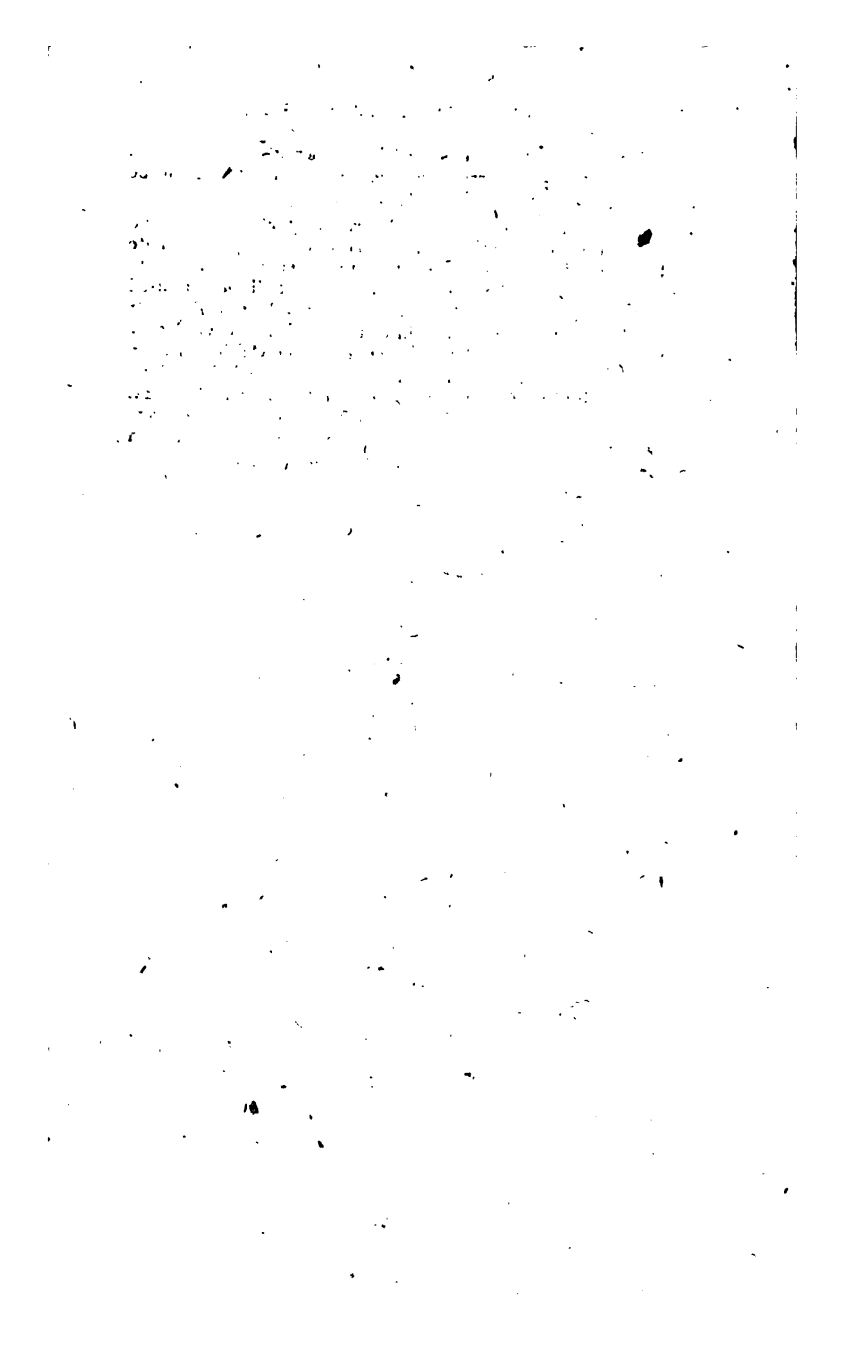
Note 23, page 516, line 11, words *in equal proportions*.—The next of kin, who are to have the benefit of the statute of distributions, must be ascertained according to the computation of the civil law, including the relations both on the paternal and maternal sides.

And when relations are thus found who are distant from the intestate by an equal number of degrees, they will share the personal property equally, although they are relations of very different denominations. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree will all be admitted to an equal distributive share of his personal property. There is only one exception to this rule, viz. where the nearest relations are a grandfather or grandmother, and brothers or sisters, although all these are related in the second degree, yet the former shall not participate with the latter; for which singular exception it does not appear that any good reason can be given. 3 Atk. 762. No difference is made between the whole and half blood in the distribution of intestate personal property. A curious question was agitated some time ago respecting the right to the administration. General Stanwix and an only daughter were lost together at sea, and it was contended, that it was a rule of the civil law that when a parent and child perish together, and the priority of their deaths is unknown, it shall be presumed that the child survives the parent. And by this rule the right to the personal estate of the general would have vested in the daughter, and by her death in her next of kin, who on the part of the mother was a different person from the next of kin to her father.

But this being only an application for the administration, and not for the interest under the statute of distributions, the court declined giving a judgment upon that question. 1 Bl. R. 640. And it does not appear that that point was ever determined in the spiritual courts. But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. Some curious cases *de commorientibus* may be seen in *Causas Celebres*, 3 Tom. 413. *et seq.* In one of which, where a father and son were slain together in a battle, and on the same day the daughter became a professed nun, it was determined that her

civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father.

Note 24, page 517, (last line) words *one-fifth part*.—There is no representation or distribution *per stirpes* but among immediate descendents and the children of brothers and sisters; for the statute has expressly declared that no representation shall be admitted among collaterals after brother's and sister's children. *f. 7*. If therefore A, the brother of the intestate be dead, leaving only grandchildren, and B be dead, leaving children, and C still be living, the grandchildren of A shall have no share, but one half will be given to the children of B, and the other half to C. *1 P. Wms. 25*. If the intestate has a mother living, and brother's or sister's children, they shall take *per stirpes* with the mother, who shall have in such case the same share as a brother or sister. *1 Atk. 458*.



MR. CHRISTIAN'S NOTES
TO
BLACKSTONE'S COMMENTARIES.

BOOK THE THIRD.
OF PRIVATE WRONGS.

CHAPTER THE FIRST.

Of the Redress of private Wrongs by the mere Act of the Parties.

Note 1, page 3, line 32, words *force by force*.—IT is said, that the defence of his servant is not a sufficient justification in an action brought against the master, for he may maintain an action for the loss of the service of his servant. *Salk. 407.*

Note 2, page 6, line 35, words *between them*.—See 2 vol. page 42.

Note 3, page 8, line 13, words *led away to the pound*.—The contrary seems to be the better opinion, the authorities for which are collected in *Harg. Co. Litt. 47.*

Note 4, page 8, line 33, words *by the landlord*.—As if horses or cattle are sent to agist, they may be immediately distrained by the landlord for rent in arrear, and the owner must seek his remedy by action against the farmer: the principle of this law extends to public livery stables, to which, if horses and carriages are sent to stand, it is determined that they are distrainable by the landlord, as if they were upon any other farm. 3 *Burr. 1498.*

Note 5, page 9, line 23, words *in his station*.—But utensils and implements of trade may be distrained where they are not in actual use, and where there is not sufficient property besides upon the premises to satisfy the demand of the landlord. 4 *T. R. 565.*

Note 6, page 14, line 30, words *to the owner himself*.—Of the days of taking and sale, one is inclusive, the other exclusive; as if the goods are distrained on the first, they may be sold on the sixth. 1 *H. Bl. 14.*

Note 7, page 15, line 8, words *action is brought*.—The statute directs that the action shall be an action of trespass or upon the case.
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and therefore an action of trover cannot be brought to recover goods taken under an irregular distress. 1 *H. Bl.* 13. To an action under this statute, the defendant may plead the general issue.

Note 8, page 17, line 26, words *award is made*.—A motion to set aside an award under a submission by an obligation, must be made before the last day of the next term after the award is made. 9 & 10 *W. III. c. 15. s. 2.* 2 *T. R.* 781. But this does not extend to an award made in pursuance of an order of *nisi prius*. *Str.* 301.

Submissions to arbitration were entered into by a rule of the court at the common law when a cause was depending, and the statute of king William was intended to give the same efficacy to awards where no suit or action was instituted. 2 *Burr.* 701.

Where a cause is referred by an order of *nisi prius*, and it is agreed that the costs shall abide the event of the award, this signifies the legal event; and if the arbitrator awards such damages for a trespass or an assault as would not, if given in a verdict, carry costs to the plaintiff, he cannot recover them under this reference, the award in such instances being not equivalent to the certificate of a judge. 3 *T. R.* 138. But arbitrators may award costs at their discretion, unless there is an express provision in the rule, that the costs shall abide the event of the award. 2 *T. R.* 644. If it is awarded that one of the parties shall pay the costs of the action, the costs of the award are not included. *H. Bl. Rep.* 223.

When arbitrators have the power of electing an umpire, they may choose him and call in his assistance as soon as they begin to take the subject into consideration. And this is the more convenient practice, as it secures a decision upon a single investigation of the controversy. 2 *T. R.* 644. The agreement to a reference must be expressed with great caution and accuracy, for if it is agreed to refer all matters in difference between the parties in the cause; the arbitrators are not confined to the subject of the cause alone, as they are when it is agreed to refer all matters in difference in the cause between the parties. 2 *T. R.* 645. Yet after an award under a reference in the first case, either party may maintain an action for a right or demand subsisting at the time of the reference, but not disputed or referred to the arbitrators. 4 *T. R.* 146.

Courts of equity exercise a jurisdiction in setting aside awards, particularly if a discovery or an account is prayed: but an arbitrator cannot be made a party, if it is agreed by the submission bond that no bill in equity shall be filed against him. 2 *Atk.* 395. Where it was one of the articles of co-partnership that all differences should be referred to arbitration, it was decided, that a court of equity could entertain no jurisdiction of the subject until the parties had referred their disputes to the consideration of arbitrators. 2 *Lan.* 336. The authority of this decision has been questioned, but it is certainly agreeable to strict equity that the parties should be bound by this reasonable agreement until the arbitrators refuse, or some circumstances occur which render them incompetent to do complete justice between the parties.

Arbitrations being unattended by the inevitable delay and expense of public litigation, are of such infinite importance to the

community, that it is rather surprising that the legislature has not yet given to arbitrators a power of compelling the attendance of witnesses, or of administering an oath to them. For until they possess this authority, like courts of justice, however wise and righteous their awards may be, it cannot be expected that they can give the same satisfaction to those who are interested in the event of the controversy. By the 29 Geo. III. c. 58. every award in writing must be upon a five shillings stamp.

CHAPTER THE THIRD.

Of Courts in general.

Note 1, page 26, line 32, words *further regulations*.—The number of attorneys has much increased within the last three centuries; for an act of parliament passed in the 33 Hen. VI. c. 7. states, that not long before that time there had not been more than six or eight attorneys in Norfolk and Suffolk *quo tempore*, (it observes,) *magna tranquillitas regnabat*, but that the number had increased to twenty-four, to the great vexation and prejudice of these counties; it therefore enacts that for the future there shall only be six attorneys in Norfolk, six in Suffolk, and two in the city of Norwich. As it does not appear that this statute was ever repeated, it might be curious to inquire how it was originally evaded.

For regulations respecting attorneys, see *Burn. tit. Attorney*.

Note 2, page 27, line 30, words *special license*.—Hence none of the king's counsel can publicly plead in court for a prisoner, or a defendant in a criminal prosecution, without a license, which is never refused; but an expense of about 9*l*. must be incurred in obtaining it.

Note 3, page 28, line 25, words *no action for his fees*.—Upon the same principle a physician cannot maintain an action for his fees. 4 *T. R.* 317.

Note 4, page 29, line 8, words *8*ol*. English money*.—The circumstances which led to this decree, as recorded by Tacitus, deserve to be mentioned. Samius, a Roman knight of distinction, having given Silius a fee of three thousand guineas to undertake his defence, and finding he was betrayed by his advocate, *ferro in domo ejus incubuit*. In consequence of this the senate insisted upon enforcing the Cincian law, *quæ cavetur antiquitus, nequis ob causam orandum pecuniam donumve accipiat*.

Tacitus then recites the arguments of those who spoke against the payment of fees, and of those who supported the practice, and concludes with telling us, that Claudius Cæsar thinking that there was more reason, though less liberality, in the arguments of the latter, *capicndis pecuniis posuit modum, usque ad dena sestertia, quem egressi repetundarum tenerentur*. 1 *Ann. lib.* 11. c. 5.

But besides the acceptance of such immense fees, the perfidy of advocates had become a common traffic; for Tacitus introduces the subject by observing, *ne quidquam publicæ mercis tam venale fuit*.

quam advocatorum perfidia. To the honour of our courts the corruption of judges and the treachery of counsel are crimes unheard of in this country.

CHAPTER THE FOURTH.

Of the Public Courts of Common Law and Equity.

Note 1, page 33, line 36, words *sometimes anciently called*.—All the freeholders of the king were called barons, but the Editor is not aware that it appears from any authority that this word was ever applied to those who held freeholds of a subject. See an account of the ancient barons, 1 vol. 423. n. 3. It seems to be the more obvious explanation of the court-baron, that it was the court of the baron or lord of the manor, to which his freeholders owed suit and service. In like manner we say the king's court and the sheriff's court.

Note 2, page 36, line 10, words *court of exchequer*.—But if an action is instituted in any of the courts of Westminster, and if the defendant makes an affidavit that the debt is under 40s. the proceedings will be stayed, unless the plaintiff will also make an affidavit to the contrary. 4 T. R. 495. 5 T. R. 64.

Note 3, page 41, line 13, words *coram ipso rege*.—This court is called the queen's bench in the reign of a queen, and during the protectorate of Cromwell it was styled the upper bench.

Note 4, page 41.—(See note. 4 Burr. 851.)—Lord Mansfield, in 4 Burr. 851. does not mean to say, nor do the records there cited warrant the conclusion, that Ed. I. actually sat in the king's bench. Dr. Henry, in his very accurate History of Great Britain, informs us, that he has found no instance of any of our kings sitting in a court of justice before Ed. IV. "And Ed. IV. (he says) in the second year of his reign, sat three days together, during Michaelmas term, in the court of King's bench; but it is not said that he interfered in the business of the court; and as he was then a very young man, it is probable that it was his intention to learn in what manner justice was administered, rather than to act the part of a judge." 5 vol. 388. 4to edit.

Lord Coke says, that the words in *magna charta*, c. 29, *nec super eum ibimus nec super eum mittimus nisi*, &c. signify that we shall not sit in judgment ourselves, nor send our commissioners or judges to try him. 2 Inst. 46.

But that this is an erroneous construction of these words, appears from a *magna charta* granted by king John in the 16th year of his reign, which is thus expressed, *nec super eor per vim vel per arma ibimus nisi per legem regni nostri vel per iudicium parium suorum*. See Int. to Bl. Mag. Ch. p. xiii.

Note 5, page 44, line 11, word *Ireland*.—This altered by the 23 Geo. III. c. 28, which see in the 1 vol. 104 n. 14.

Note 6, page 48, line 9, words *king's books*.—With regard to the chancellor's patronage, there seems to be some inaccuracy in the

learned Judge's text and references. I humbly conceive that a truer statement is this, viz. that it appears from the rolls of parliament that it had been the usage before that time for the chancellors to give all the king's livings, taxed (by the subsidy assessments) at twenty marks or under, to the clerks, who were then actually *cleri* or clergymen, who had long laboured in the court of chancery; but that the bishop of Lincoln, when he was chancellor, had given such livings to his own and other clerks, contrary to the pleasure of the king and the ancient usage; and therefore it is recommended to the king by the council to command the chancellor to give such livings only to the clerks of chancery, the exchequer, and the other two benches or courts of Westminster-hall. 4 Ed. III. no. 51. But since the new valuation of benefices, or the king's books in the time of Henry the Eighth, and the clerks ceased to be in orders, the chancellor has had the absolute disposal of all the king's livings, even where the presentation devolves to the crown by lapse, of the value of twenty pounds a year or under in the king's books. It does not appear how this enlarged patronage has been obtained by the chancellor, but it is probable by a private grant of the crown, from a consideration that the twenty marks in the time of Ed. III. were equivalent to twenty pounds in the time of Henry VIII. *Gibb. 764. 1 Burn. Ec. Law, 129.*

Note 7, page 58, line 33, words *superior courts*.—The courts of *nisi prius* in London and Middlesex are called *sittings*, and those for Middlesex were established by the legislature in the reign of queen Elizabeth. In ancient times all issues in actions brought in that county were tried at Westminster in the terms, at the bar of the court in which the action was instituted; but when the business of the courts increased, these trials were found so great an inconvenience, that it was enacted by the 18 Eliz. c. 12. that the chief justice of the king's bench should be empowered to try within the term, or within four days after the end of the term, all the issues joined in the courts of chancery and king's bench; and that the chief justice of the common pleas; and the chief baron should try in like manner the issues joined in their respective courts.

In the absence of any one of the chiefs, the same authority was given to two of the judges or barons of his court. The statute 12 Geo. I. c. 31. extended the time to eight days after term, and empowered one judge or baron to sit in the absence of the chief. The 24 Geo. II. c. 18. has extended the time after term still farther to fourteen days.

Note 8, page 65, line 4, words *or doth inhabit*.—This restriction was confined to extend to every commission of the judges; but it being found very inconvenient the 12 Geo. II. c. 27. was enacted for the express purpose of authorising the commissioners of *oyer and terminer*, and of *gaol delivery*, to execute their commissions in the criminal courts within the counties in which they were born, or in which they reside. See 4 vol. 271.

CHAPTER THE FIFTH.

Of Courts Ecclesiastical, Military and Maritime.

Note 1, page 67, line 11, word *convocation*.—No such assembly can exist as all the bishops of the realm in any house of convocation. But the statute says, that the appeal shall be to the bishops, abbots, and priors of the upper house of the convocation of the province, in which the cause of the *suit arises*. Therefore in the province of York, the appeal lies now to the archbishop and his three bishops. In the province of Canterbury, to the rest of the bench of bishops. See 1 vol. 291. n. 24.

CHAPTER THE SIXTH.

Of Courts of a Special Jurisdiction.

Note 1, page 73, line 10, words *of the subject*.—All the forests, which were made after the conquest, except New Forest in Hampshire created by William the conqueror, were disafforested by the *charta de foresta*. The forest of Hampton Court was established by the authority of parliament in the reign of Hen. VIII. The number of forests in England is sixty-nine. 4 *Inst.* 319 Charles I. enforced the odious forest laws, as a source of revenue independent of the parliament.

Note 2, page 82, line 17, words *city of London*.—By the Geo. III. c. 45. and 26 Geo. III. c. 38. no debtor or defendant, in any court for the recovery of small debts, where the debt does not exceed twenty shillings, shall be committed to prison for more than twenty days, and if the debt does not exceed forty shillings, for more than forty days; unless it be proved to the satisfaction of the court, that he has money or goods which he fraudulently conceals, and in the first case the imprisonment may be extended to thirty days, and in the latter to sixty.

CHAPTER THE SEVENTH.

Of the Cognizance of Private Wrongs.

Note 3, page 94, line 18, words *and the like*.—It has lately been determined by the court of delegates, that the public infamy of the husband, arising from a judicial conviction of an attempt to commit an unnatural crime, is a sufficient cause for the ecclesiastical courts to decree a separation *a mensa et thoro*. Feb. 1794.

Note 4, page 102, line 11, words *in any court*.—In ancient times, a person, who, by his contempt of the laws and judgments of the church, had brought upon himself the sentence of excommunication, was thought to be influenced by no religious sentiments, and consequently to be regardless of the obligation of an oath; but as the same degree of reverence is not at present attached to the censures and degrees of the spiritual judge, and as this incapacity of witnesses is a great obstruction to the administration of justice, it ought to be removed by the authority of the legislature.

Note 5, page 111, line 33, words *to do his duty*.—See further upon the writ of *mandamus*, p. 264, post.

Note 6, page 113, line 18, words *the plea*.—The general grounds for a prohibition to the ecclesiastical courts are, either a defect of jurisdiction or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at issue, that court has no jurisdiction to try it, because it cannot proceed according to the rules of the common law; and in such case a prohibition lies. Or where the spiritual court has no original jurisdiction, a prohibition may be granted even after sentence. But where it has jurisdiction, and gives a wrong judgment, it is the subject matter of appeal and not of prohibition. *Lord Kenyon, 3 T. R. 4.*

But when a prohibition is granted after sentence, the want of jurisdiction must appear upon the face of the proceedings of the spiritual court. *Ibid. Cowp. 422.* See also 4 *T. R.* 382.

CHAPTER THE EIGHTH

Of Wrongs and their Remedies, respecting the Rights of Persons.

Note 1, page 120, line 30, words *occasioned it*.—But in any criminal prosecution by indictment, or information for an assault or battery, the defendant may plead the general issue, and give in evidence that the person assaulted or beat was the first assailant, or that he first made an attack upon the defendant himself, his wife, his father, son, master, or perhaps, servant; (see p. 3. *ii. 1. ante*) and, upon producing satisfactory proof of this justification, the defendant ought to be acquitted by the jury.

Note 2, page 121, line 23, words *self-preservation*.—One remarkable property is peculiar to the action for a mayhem, *viz.* that the court in which the action is brought have a discretionary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*; and upon proof that it is the same wound, concerning which evidence was given to the jury. 1 *Willf* 5. 1 *Barnes* 106.

Note 3, page 123, line 22, words *or a lawyer knows*.—When words, that are actionable in themselves if unexplained, are accompanied by qualifications and allusions, which prove that the meaning of them is such, that even if they were true, they would not subject the person of whom they are spoken to any punishment or penalty, they are not slanderous; as to say a man is a thief, because he has stolen a cat, the stealing of which is not a felony; or to charge a lady with theft or murder, where the accusation is intended as a compliment, and alludes only to the fascinating or fatal influence of her beauty. There are only three disorders which the law deems it scandalous to report that a person labours under, *viz.* the plague, the leprosy, and the *lues venerea*. *Com. Dig. AB. Dig. D. 28.* These three maladies in ancient times were so contagious and alarming that the person afflicted was

obliged to be abandoned by his friends; and when the leprosy prevailed in this country, there was a peculiar writ *de leproso amovendo* to remove a leper from society. The probability that this inconvenience may result from such a charge being the principle which constitutes the slander, it has agreeably thereto been decided that it is not actionable to say a person has had such a disorder, the infection of which may long have been removed. 2 T. R. 473.

Note 4, page 123, line 33, word *sustained*.—This action of public prosecution, for it partakes of both, for *scandalum magnatum* is totally different from the action of slander in the case of common persons. The *scandalum magnatum* is reduced to no rule or certain definition, but it may be whatever the courts in their discretion shall judge to be derogatory to the high character of the person of whom it is spoken; as it was held to be *scandalum magnatum* to say of a peer, "he was no more to be valued than a dog;" which words would have been perfectly harmless if uttered of any inferior person. *Bull. N.P.4.* This action is now seldom or never resorted to. By the two first statutes upon which it is founded, (3 Ed. I. c. 34. and 2 R. II. st. 2. c. 5.) the defendant may be imprisoned till he produces the first author of the scandal, hence probably is the origin of the vulgar notion that a person who has propagated a slander may be compelled to give up his author.

Note 5, page 125, line 9, word *slander*.—The words scoundrel, rascal, villain, knave, miscreant, liar, fool, and such like general terms of scurrility, may be used with impunity, and are part of the rights and privileges of the vulgar. To constitute legal slander, the words must impute a precise crime; hence it is actionable to say a man is a highwayman, but it is not so, to say he is worse than a highwayman. *G. Cooke, 160. 3 Wils. 184.* This subject has been fully discussed by C. J. De Grey; who lays down this position, "that there must be some certain or probable temporal loss or damage to make words actionable: but to impute to a man the mere defect or want of moral virtue, moral duties or obligations, which renders a man obnoxious to mankind, is not actionable." And therefore he and the court determined, that the following declaration concerning a member of parliament at a county meeting, did not amount to a legal slander, *viz.* "As to instructing our members to obtain redress, I am totally against that plan, for as to instructing Mr. O. we might as well instruct the winds, and should he even promise his assistance, I should not expect him to give it us." 3 *Wils. 177.*

A verbal charge of incontinence and prostitution against a woman of modesty and honour, is not a slander cognizable in any temporal court except in a city court, where the cause of action arises within the jurisdiction of the city of London. See 1 vol. p. 76. n. 9.

No action can be maintained for words even attended with a special damage, if they are spoken from friendship or justice to another, and not from malice towards the person who is the subject of them; as if upon an inquiry being made a master is obli-

ed to give an unfavourable character of a discarded servant. 1 T. R. 110.

The principal distinctions between actions for words, which are actionable in themselves, and actions for words, which are not so without special damage, are these, viz. the first by 21 J. 1. c. 16. must be brought within two years, and if the damages are under 40s. the plaintiff shall recover costs only to the extent of the damages, but the latter may be brought at any time within six years, and a verdict with any damages whatever will entitle the plaintiff to full costs. *Bull. N. P. 11. See Espinasse tit. Slander.*

Note 6, page 126, line 9, word *thereupon*.—When this was originally written by the learned Commentator, the important distinction between libels and words spoken does not seem to have been so fully established as it was some time afterwards by the case of *Villiers v. Mousley*, 2 Wils. 403. viz. that whatever renders a man ridiculous, or lowers him in the esteem and opinion of the world, amounts to a libel; though the same expressions, if spoken, would not have been defamation: as to call a person in writing *an itchy old toad*, was held in that case to be a libel; although as words spoken they would not have been actionable.

A young lady of quality lately recovered 4000*l.* damages for reflections upon her chastity published in a newspaper; yet she could have brought no action for the grossest aspersions which could have been uttered against her honour.

There are authorities, that truth is not a justification in an action for a libel, and a very learned writer seems to doubt, whether such a plea would now be admitted by the courts, if the accusation in the libel did not amount to an indictable offence: (3 Woodd. 182.) but I am inclined to think that the contrary is the prevailing opinion of the profession; and that in every action for a libel, if specific instances can be stated upon the record and proved by evidence, so as to support the general charge of the libel, the courts would determine them to be a sufficient justification of the defendant. 1 T. R. 748. And the chief excellence of the civil action for a libel consists in this, that it not only affords a reparation for the injury sustained, but it is a full vindication of the innocence of the person traduced.

An action for a libel differs from an action for words, for the former may be brought at any time within six years, and any damages will entitle the plaintiff to full costs.

See more upon libels, 4 vol. p. 150.

Note 7, page 126, line 30, word *acquittal*.—In an action for a malicious prosecution, where the plaintiff has been indicted for a felony, it is necessary to produce a copy of the record granted by the court before which he was acquitted; but the practice is otherwise in misdemeanours, and in such a case the action may be sustained by the production of the original record of the acquittal. 1 Bl. Rep. 385.

Note 8, page 127, line 16, words *justify the defendant*.—The essential ground of this action is, that a legal prosecution was carried on

without any probable cause ; but this must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is implied. The knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied. *Sutton v. Johnson*, 1 T. R. 544.

Note 9, page 128, line 1, words *shall be void*.—But the statute has excepted cases of treason, felony, and breach of the peace, in which the execution of a lawful warrant or process is allowed upon a Sunday.

Note 10, page 136, line 15, words *and liberty*.—Bishop Burnet relates a circumstance respecting the *habeas corpus* act, which is more curious than credible ; but though we cannot be induced to suppose that this important statute was obtained by a jest and a fraud, yet the story proves that a very formidable opposition was made to it at that time. “It was carried (says he) by an odd artifice in the house of lords. Lord Grey and Lord Norris were named to be the tellers, lord Norris being a man subject to vapours, was not at all times attentive to what he was doing, so a very fat lord coming in, lord Grey counted him for ten as a jest at first, but seeing lord Norris had not observed it, he went on with this misreckoning of ten, so it was reported to the house, and declared that they who were for the bill were the majority, though it indeed went on the other side ; and by this means the bill past.” 1 *Burnet, Hist. Ch. II.* 485.

Note 11, page 138, line 17, words *they were forgotten*.—Besides the efficacy of the writ of *habeas corpus* in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father ; but when women or infants are brought before the court by a *habeas corpus*, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to choose where they will go ; and if there be any reason to apprehend that they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian. See 3 *Burr.* 1434, where all the prior cases are considered by lord Mansfield.

Note 12, page 140, line 17, words *evidence of marriage*.—Evidence may be given in mitigation of damages, that the husband had criminal connexions with other women, or that he was not accustomed to treat his wife with tenderness and affection, or that they did not live together upon terms of harmony or cordiality ; for the jury must collect, from a consideration of such circumstances, the extent of the wound which is given to the husband's feelings and happiness. It is now settled, that if the jury should be com-

vinced that the husband consented to the infamy of his wife, they ought to find a verdict for the defendant. 4 T. R. 651. This is founded either upon the maxim *volenti non fit injuria*, or upon the consideration that the plaintiff as a profligate *particeps criminis*, appears under too unfavourable circumstances to receive any countenance or protection in a court of justice. But if the husband's conduct does not prove actual consent, but only that degree of negligence or levity, which probably contributed to the seduction of his wife, it will not deprive him of a verdict, however it may lessen the damages. But he can maintain no action if he lives entirely separated from his wife in consequence of a mutual agreement; for the *gist* or foundation of the action is held to consist in the husband's loss of the comfort and society of his wife. 5 T. R. 357.

The judges have declared, that in all actions of this sort it is the peculiar province of the jury to estimate what pecuniary reparation ought to be granted; and they have refused to grant a new trial for excessive damages, where a verdict was given for 5000*l.* under circumstances which were such, that one learned judge was of opinion they amounted to evidence of consent, and that a verdict ought to have been given for the defendant. 4 T. R. 651. However reluctant the judges may appear to become the arbitrators of the price of adultery, yet that delicacy perhaps ought not to be extended to a verdict; which from the manifest circumstances of the case cannot possibly be reconciled with any fair and rational measure of justice.

This action for criminal conversation having in it a mixture of penal prosecution, sufficient evidence must be produced to satisfy the jury of the actual marriage, and the identity of the parties. *Doug.* 166.

Note 13, page 143, line 5, words *their servants*.—It appears to be a remarkable omission in the law of England, which with such scrupulous solicitude guards the rights of individuals, and secures the morals and good order of the community, that it should have afforded so little protection to female chastity. It is true that it has defended it by the punishment of death from force and violence, but has left it exposed to perhaps greater danger from the artifices and solicitations of seduction. In no case whatever, unless she has had a promise of marriage, can a woman herself obtain any reparation for the injury she has sustained from the seducer of her virtue. And even where her weakness and credulity have been imposed upon by the most solemn promises of marriage, unless they have been overheard or made in writing, she cannot recover any compensation, being incapable of giving evidence in her own cause. Nor can a parent maintain any action in the temporal courts against the person who has done this wrong to his family, and to his honour and happiness, but by stating and proving, that from the consequences of the seduction his daughter is less able to assist him as a servant, or that the seducer in the pursuit of his daughter was a trespasser upon his premises. Hence no action can be maintained for the seduction of a daughter, which is not attended with a loss

of service or an injury to property. Therefore, in that action for seduction which is in most general use, viz. a *per quod servitium amisit*, the father must prove that his daughter, when seduced, actually assisted in some degree, however inconsiderable, in the housewifery of his family; and that she has been rendered less serviceable to him by her pregnancy: and I should think the action would be sustained upon the evidence of a consumption or any real disorder, contracted by the daughter, in consequence of her seduction, or of her shame and sorrow for the violation of her honour. It is immaterial what is the age of the daughter, but it is necessary that at the time of the seduction she should be living in, or be considered part of, her father's family. 4 Burr. 1878. 3 Wils. 18. And Mr. J. Wilson, in a case upon the northern circuit, was of opinion, that a young woman who was upon a visit at a relation's house, and was there seduced, might be considered, in support of this action, as in the service of her father, or as part of his family. In this action, as the daughter does not necessarily receive any part of the damages recovered, she is a competent witness, and is generally produced to prove the circumstances of the seduction. But in such cases, as in actions for adultery, the damages are estimated from the rank and situation of the parent, or from the degree of affliction which, under all the circumstances, he may be supposed to suffer. It should seem that this action may be brought by a grandfather, brother, uncle, aunt, or any relation under the protection of whom, *in loco parentis*, a woman resides; especially if the case be such that she can bring no action herself: but the courts would not permit a person to be punished twice by exemplary damages for the same injury. 2 T. R. 4.

Another action for seduction is a common action for trespass, which may be brought when the seducer illegally entered the father's house; in which action the debauching his daughter may be stated and proved as an aggravation of the trespass. 2 T. R. 1787.

In this action the seduction may be proved, though it may not have been followed by the consequences of pregnancy or the loss of service. But these are the only actions which have been extended by the modern ingenuity of the courts, to enable an unhappy parent to recover a recompense under certain circumstances, for the injury he has sustained by the seduction of his daughter.

CHAPTER THE NINTH.

Of Injuries to Personal Property.

Note 1, page 148, line 10, words *disfrained upon*.—If goods are taken in distress for rent and are replevied, the landlord who disfrained has no lien upon the goods, but his only remedy is upon the replevin-bond. 1 Bro. 427.

Note 2, page 154, line 15, words *of such evil habit*.—But the owner is not answerable for the first mischief done by a dog, a bull, or other tame animal, Bull. N. P. 77. Yet if he should carry his dog into a field, where he himself is a trespasser, and the dog should kill

sheep, this, though the first offence, might, I conceive, be stated and proved as an aggravation of the trespass.

Note 3, page 159, line 24, word *void*.—These provisions in the statute have produced many decisions both in the courts of law and equity.

It is determined, that if two persons go to a shop, and one orders goods, and the other says, "if he does not pay I will, or I will see you paid," he is not bound unless his engagement is reduced into writing; in all such cases the question is, who is the buyer, or to whom the credit is given, and who is the surety, and that question from all the circumstances, must be ascertained by the jury: for if the person for whose use the goods are furnished be liable at all, any promise by a third person to discharge the debt must be in writing, otherwise it is void. 2 T. R. 80. H. Bl. Rep. 120. Mutual promises to marry need not be in writing, but the statute relates only to agreements made in consideration of the marriage. A lease not exceeding three years, in which the rent reserved amounts to two-thirds of the improved value, is good without writing; but all other parole leases or agreements for any interest in lands, have the effect of estates at will only. Bull. N. P. 279. All declarations of trusts, except such as result by implication of law, must be made in writing. 23 Car. II. c. 3. f. 7 & 8.

If a promise depends upon a contingency, which may or may not fall within a year, it is not within the statute; as a promise to pay a sum of money upon a death or marriage, or upon the return of a ship, or to leave a legacy by will, is good by parole; for such a promise may by possibility be performed within the year. 3 Burr. 1278. 1 Salk. 280. 3 Salk. 9. &c.

With regard to the contracts for goods of the value of 10*l*. See 2 vol. 447. n. 6 & 7.

But a court of equity will decree a specific performance of a verbal contract, when it is confessed by a defendant in his answer, or when there has been a part performance of it; as by payment of part of the consideration money, or by entering and expending money upon the estate, for such acts preclude the party from denying the existence of the contract, and prove that there can be no fraud or perjury in obtaining the execution of it.

If one party only signs an agreement, he is bound by it; and if an agreement is by parole, but it is agreed it shall be reduced into writing, and this is prevented by the fraud of one of the parties, performance of it will be decreed. 2 Bro. 564, 5, 6. See 3 Wood. Lest. lvii. and Fontblanque Tr. of Eq. b. 1. c. 3. f. 8 & 9, where this subject is fully and learnedly discussed.

Note 4, page 163, line 35, word *assumpsit*.—If a surety in a bond pays the debt of the principal, he may recover it back from the principal in an action of *assumpsit*, for so much money paid and advanced to his use; yet in ancient times this action could not be maintained; and it is said, that the first case of the kind, in which the plaintiff succeeded, was tried before the late Mr. J. Gould at

Dorchester. But this is perfectly consistent with the equitable principles of an *assumpsit*. 2 T. R. 105.

Note 5, page 166, line 36, words *two years hence*.—There seems to be no reason or principle, why, upon a sufficient consideration, an express warranty that a horse should continue sound for two years, should not be valid. Lord Mansfield declared, in a case in which the sentence in the text was cited, "there is no doubt, but you may warrant a future event." Doug. 707.

CHAPTER THE TENTH.

Of Injuries to real Property; and first, of Dispossession, or Ouster of the Freehold.

Note 1, page 196, line 31, word *whatsoever*.—This is far from being universally true; for an uninterrupted possession for sixty years will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years, continues above sixty years, still the reversioner may enter and recover the estate; the possession must be adverse, and lord Coke says, "it has been resolved, that, although a man has been out of possession of land for sixty years, yet if his entry is not tolled he may enter and bring any action of his own possession; and if his entry be congeable, and he enter, he may have an action of his own possession." 4 Co. 11. b.

CHAPTER THE ELEVENTH.

Of Dispossession, or Ouster, or Chattels Real.

Note 1, page 203, line 2, words *of trying the title*.—An actual entry is necessary to avoid a fine levied with proclamations, and the demise laid in the ejectment must be subsequent to the entry; but that is the only case in which an actual entry is required. 2 Str. 1086. Doug. 468. 1 T. R. 741. Unless it is an ejectment brought to recover on a vacant possession, and not by a landlord upon a right of re-entry under the 4 Geo. II. c. 28; in which case the lessor or his attorney must actually seal a lease upon the premises to the plaintiff, who must be ejected by a real person. See the mode of proceeding, 2 Cramp. Prac. 198.

Note 2, page 204, line 6, words *the title only*.—It has been determined, that no ejectment can be maintained where the lessor of the plaintiff has not a legal right of entry; as the heir at law was barred from recovering in ejectment, where there was an unsatisfied term raised for the purpose of securing an annuity, though the heir claimed the estate subject to that charge. But a satisfied term will be presumed to be surrendered; and the courts will not permit the plaintiff in ejectment to be non-suited by a term standing out in the trustee of the lessor. 2 T. R. 695. 1 T. R. 758.

Note 3, page 205, line 15, words *is broken*.—Where an ejectment is defended merely to continue the possession of the premises,

and no defence is made at the trial, the practice is for the crier of the court, first, to call the defendant to confess lease, entry, and ouster, and then the plaintiff, as in other cases of nonsuits, to come forth or he will lose his writ of *nisi prius*.

Though in this case the judgment is given against the casual ejector, yet the costs are taxed as in other cases, and if the real defendant refuses to pay them, the court will grant an attachment against him. *Salk. 259.*

In like manner if there be a verdict for the defendant, or the nominal plaintiff be nonsuited without the default of the defendant, the defendant must tax his costs, and sue out a writ of execution against the nominal plaintiff; and if, upon serving the lessor of the plaintiff with this writ and a copy of the rule to confess lease entry, and ouster, the lessor of the plaintiff does not pay the costs, the court will grant an attachment against him. *2 Cromp. Pract. 214.* In ejectment the unsuccessful party may re-try the same question as often as he pleases without the leave of the court; for by making a fresh demise to another nominal character, it becomes the action of a new plaintiff upon another right, and the courts of law cannot any farther prevent this repetition of the action, than by ordering the proceedings in one ejectment to be stayed till the costs of the former ejectment, though brought in another court, be discharged. *2 Bl. Rep. 1158. Burner, 133.* But a court of equity, in some instances where there have been several trials in ejectment for the same premises, though the title was entirely legal, has granted a perpetual injunction. *1 P. W. 672.*

Note 4, page 205, line 35, words *a new defence*.—The defendant may plead the statute of limitations, and by that means protect himself from the payment of all *mesne profits*, except those which have accrued in the last six years. *Bull. N. P. 88.*

Note 5, page 207, line 207, word *afterwards*.—A devisee, although he has never been in possession, has been permitted to defend as a landlord under this statute, *4 Geo. II. c. 28. 4 T. R. 147.*

CHAPTER THE TWELFTH.

Of Tresspass.

Note 1, page 208, (last line) words *be brought*.—The distinctions between actions of trespass *vi et armis* for an immediate injury, and actions of trespass upon the case for a consequential damage, are frequently very delicate; see the subject much considered in *2 Bl. Rep. 892*, in a case where an action of trespass *vi et armis* was brought against the defendant for throwing a lighted squib in a public market, which fell upon a stall; the owner of which, to defend himself and his goods, took it up, and threw it to another part of the market, where it struck the plaintiff and put out his eye.

The question was much discussed, whether the person injured ought to have brought an action of trespass *vi et armis*, or an action upon the case; and one of the four judges strenuously contended

that it ought to have been an action upon the case. But I should humbly conceive, that the question was more properly this, viz. whether an action of trespass *vi et armis* lay against the original and intermediate thrower, or whether the act of the second thrower was involuntary, (which seems to have been the opinion of the jury) or wilful and mischievous, and therefore he alone ought to have been answerable for the consequences. For if A throws a stone at B, which after it lies quietly at his foot, B takes up and throws again at C, it is presumed that C has his action against B only; but if it is thrown at B, and B, by warding it off from himself, gives it a different direction, in consequence of which it strikes C, in that case, it is wholly the act of A, and B must be considered merely as an involuntary or inanimate object.

Note 2, page 211, line 15, word *execution*.—See 2 vol. p. 150. n. 5.

Note 3, page 213, line 2, words *the mosaical law*.—Two actions of trespass have been brought in the common pleas against gleaners, with an intent to try the general question, viz. whether such a right existed; in the first, the defendant pleaded that he being a poor, necessitous, and indigent person, entered the plaintiff's close to glean; in the second the defendant's plea was as before, with the addition that he was an inhabitant legally settled within the parish; to the plea in each case there was a general demurrer. Mr. J. Gould delivered a learned judgment in favour of gleaning, but the other three judges were clearly of opinion that this claim had no foundation in law; that it had no better origin than an extrajudicial dictum of lord Hale; that it was a practice incompatible with the exclusive enjoyment of property, and was productive of vagrancy, and many mischievous consequences. 1 H. Bl. Rep. 51.

Note 4, page 213, line 6, words *to the public*.—It has been determined in a late case, that it is lawful to follow a fox with hounds and hounds over another's ground, if no more damage be done than is necessary for the destruction of the animal by such a pursuit. 1 T. R. 338.

Note 5, page 214, line 31, words *full costs*.—The judge must certify in open court after the trial, otherwise the certificate is void. 2 Willf. 21.

Note 6, page 214, line 36, words *disfranchises the plaintiff*.—If a person has notice not to come or continue upon another's land, as if a sportsman has notice or warning not to come again, or to go off, and he repeats or continues the trespass, upon proof of this, the judges think themselves bound to certify that the trespass is wilful and malicious, and the plaintiff will in consequence be entitled to full costs. 1 Esp. 425.

Note 7, page 215, (last line) words *pay full costs*.—The persons described in the 4 & 5 W. & M. c. 23. are subject to pay full costs, though the damages are under 40s. without any previous notice or certificate of the judge. The words *inferior tradesmen* are so vague that the court of common pleas were divided in opinion, whether a person who was a surgeon and apothecary came under that description. 2 Willf. 70.

It has been decided, that a gentleman's huntsman is not a dissolute person under this act; and where the plaintiff states the defendant in his declaration to be a dissolute person, or other person mentioned in the act, if he should not prove him so at the trial, still he may recover a verdict as in a common action of trespass, 2 Bl. Rep. 900.

CHAPTER THE THIRTEENTH.

Of Nuisance.

Note 1, page 216, (last line) words *injury done*.—The judges now hold, that lights will be considered ancient to support this action, of which there has been an uninterrupted enjoyment above twenty years.

Note 2, page 217, line 8, word *unwholesome*.—Lord Mansfield has said, that "it is not necessary that the smell should be unwholesome; it is enough, if it renders the enjoyment of life and property uncomfortable." 1 Burr. 337.

Note 3, page 220, line 9, words *particular damage*.—But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. 26.

CHAPTER THE FOURTEENTH.

Of Wastes.

Note 1, page 223, line 28, words *in fee simple*.—A tenant in fee-tail has the same uncontrolled and unlimited power in committing waste, as a tenant in fee-simple.

Note 2, page 225, line 21, words *no injury*.—No person is entitled to an action of waste against a tenant for life, but he who has the immediate estate of inheritance in remainder or reversion, expectant upon the estate for life. If between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there is interposed an estate of freehold to any person *in esse*, then, during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone forever. Harg. Co. Litt. 218. b.

Note 3, page 229, line 4, word *accident*.—But the destruction of a house by fire, unless in convenient time repaired, is waste. So between landlord and tenant, though there be no covenant to repair or rebuild, the tenant is subject to waste in general: and, if the house be burnt by fire, he must rebuild. 1 Ves. 461.

CHAPTER THE SIXTEENTH.

Of Disturbance.

Note 1, page 239, line 8, word *tenement*.—And agreeably to this rule it has been decided, that a claim of a right of common for all

commonable cattle, *lewsn*: and *couchart*, in right of a messuage, to which no land is appurtenant, cannot be supported. § T. R. 46.

Note 2, page 241, line 1, words *their land*.—See 2 vol. p. 33. n. 14.

CHAPTER THE SEVENTEENTH.

Of Injuries proceeding from, or affecting, the Crown.

Note 1, page 264, line 31, word *suit*.—This statute, with regard to costs, extends only to cases where the title of a person to be a corporate officer, as mayor, bailiff, or freeman, is in question; but an information to try the right of holding a court is not within it, but stands upon the common law only, and being a prosecution in the name of the king, no costs are given. 1 Burr. 402.

The court of king's bench having a discretionary power of granting informations in the nature of *quo warranto*, had long ago established a general rule to guide their discretion, *viz.* not to allow in any case an information in the nature of *quo warranto* against a person who had been twenty years in the possession of his franchise; but having reason to consider this too extensive a limit, they resolved upon a new rule, *viz.* not to allow such an information against any person who had been six years in possession. 4 T. R. 284.

But the legislature thinking this too sudden a change in the practice of the court, and because it did not extend to informations filed by the attorney-general, enacted by 32 George III. c. 58. that to any information in the nature of *quo warranto*, for the exercise of any corporate office or franchise, the defendant might plead that he had been in possession of, or had executed, the office for six years or more. And that no defendant should be affected by any defect in the title of the person from whom he derived his right and title, if that person had been in the undisturbed exercise of his office or franchise six years previous to the filing of the information.

CHAPTER THE EIGHTEENTH.

Of the Pursuit of Remedies by Action; and first, of the Original Writ.

Note 1, page 278, line 19, words *Hilary term*.—Michaelmas term always begins on the 6th of November, and ends on the 28th of the same month; Hilary term always begins on the 23d of January, and ends on the 12th of February; unless any of these four days falls on a Sunday, then the term begins or ends on the day following. Easter term begins always on the Wednesday fortnight after Easter-sunday, and ends on the Monday three weeks afterwards. Trinity term begins always on the Friday after Trinity-sunday, and ends on the Wednesday fortnight after it begins. 1 Cramp. Prac. 1.

CHAPTER THE NINETEENTH.

Of Process.

Note 1, page 287, line 36, words *days after*.—In all cases where the defendant is served with a copy of the process, he has eight

days to file common bail in the king's bench, or to enter a common appearance in the common pleas, exclusive of the return day; and if the last of the eight days is a Sunday, he has all the next day. 1 *Crompt. Prac.* 48. 1 *Burr.* 56.

Note 2, page 288, line 2, words *or upwards*.—This affidavit must be certain and positive; for an affidavit made upon belief, or with a reference to something else, as where the plaintiff swears the defendant is indebted to him in ten pounds or upwards, as appears by his books, or by a bill delivered, will not be sufficient, unless the plaintiff is an executor, administrator, or assignee; for then, from the nature of his situation, he cannot swear more positively than from belief, or from a reference to the accounts of others. 1 *Sellen's Prac.* 112.

Note 3, page 289, line 6, words *no violence*.—A bailiff before he has made the arrest cannot break open an outer door of a house; but if he enters the outer door peaceably, he may then break open the inner door, though it be the apartment of a lodger, if the owner himself occupies part of the house. *Crompt. 1.* But if the whole house be let in lodgings, as each lodging is then considered a dwelling-house, in which burglary may be stated to have been committed, so in that case I conceive the door of each apartment would be considered an outer door, which could not be legally broken open to execute an arrest. *Crompt. 2.* It is not necessary that the arrest should be made by the hand of the bailiff, nor that he should be actually in sight; yet where an arrest is made by his assistant or follower, the bailiff ought to be so near as to be considered as acting in it. *Crompt. 65.*

Note 4, page 291, line 7, words *four days after*.—In London and Middlesex special bail in the king's bench must be put in within four days, exclusive of the return of the writ; in any other county within six days; but if the last day falls on a Sunday, it may then be put in on the Monday following. In any other county where the action is brought in the common pleas special bail may be put in within eight days. 1 *Crompt. Prac.* 59.

Note 5, page 291, line 29, words *in some cases double*.—If the defendant is not present, and does not enter into the recognizance, then the bail are bound in double the sum sworn to. 1 *Crompt. 56.*

CHAPTER THE TWENTIETH

Of Pleadings.

Note 1, page 294, line 19, words *evidence in the first*.—But if he fails to produce at the trial material evidence of the cause of action in the county, in which he has laid it, he must be nonsuited, though he might have recovered a verdict in another county. 2 *Bl. Rep.* 1631.

Note 2, page 294, line 34, words *be led therein*.—The court will not change the venue in an action brought upon a specialty, a pro-

missory note, or a bill of exchange; yet, in one case where the action was upon a bond, and the witnesses of both parties lived in the county to which the defendant prayed the venue might be changed, the court ordered it to be changed upon condition that the defendant should bring no writ of error, and should give judgment of the term preceding the trial. 1 T. R. 781.

Note 3, page 302, line 5, words *material respect*.—All dilatory pleas are called pleas *in abatement*; in contradistinction to pleas *in bar*. By the 4 and 5 Ann. c. 16. and the practice of the courts, no plea in abatement can be received, unless the defendant proves the truth of it by affidavit. 1 Cramp. 132. 3 Burr. 1618.

These pleas are not favoured by the courts, and they must be filed within four days after the day upon which the declaration is delivered, both days being inclusive. 1 T. R. 277.

Where an action is brought against one or some only of a number of partners, if the defendant or defendants intend to take advantage of the partnership, it must be pleaded in abatement, or it is supposed to be waived.

But the plea in abatement must state who are the real partners; 1 Bl. Rep. 947. But if an action be brought in the name of some of the partners only, the defendant may avail himself of this objection at the trial.

Note 4, page 304, line 2, words *totally lose his money*.—A tender in bank notes is sufficient, unless the creditor expressly refuses to receive notes, and insists upon cash. 3 T. R. 554.

Note 5, page 305, line 13, words *plaintiff's demand*.—The debts between the plaintiff and defendant must be mutual, but may be of different natures; if the defendant does not specially plead his debt as a set-off, he must deliver a notice of set-off together with the plea of the general issue. A notice of set-off ought to be expressed with almost as much certainty as a declaration; and the delivery of it must be proved at the trial of the cause. 1 Cramp. Pr. 157. But in actions by or against the assignees of a bankrupt, the sum justly due may be recovered under the 5 Geo. II. c. 30. without either pleading, or giving notice of a set-off. 1 T. R. 115.

Note 6, page 307, line 24, words *account and case*.—Under the head of actions upon the case are included actions for libels, criminal conversation, seduction, and actions for words, which are not actionable without a special damage.

Note 7, page 307, line 25, words *between merchants*.—This exception does not extend to a tradesman's account with his customer; for in this case there are not mutual dealings, and the tradesman is barred by the statute from recovering for more than those articles, which have been sold within six years. Bull. N. P. 149.

Note 8, page 307, line 31, words *injury committed*.—The statute makes an exception for all persons who shall be under age, *feme covert*, *non compos mentis*, in prison, or abroad, when the cause of action accrues; and the limitations of the statute shall only commence from the time when their respective impediments or disa-

bilities are removed; sec. 7. But if one only of a number of partners lives abroad, they must bring their action within six years after the cause of it accrued. 4 T. R. 516. And where a party has been guilty of any fraud in his dealings or accounts, the courts of law and equity have determined that he shall only protect himself by the statute of limitations from the time his fraud is discovered. 3 P. Wms. 143; Doug. 630.

Any acknowledgment of the existence of the debt, however slight, will take it out of the statute, and the limitation will then run from that time; and where an expression is ambiguous, it shall be left to the consideration of the jury, whether it amounts or not to such acknowledgment. 2 T. R. 760. Where there are two or more drawers of a joint and several promissory note, the acknowledgment of one may be given in evidence in a separate action against another, and will defeat the effect of the statute. Doug. 629.

Note 9, page 307, line 36, words *offence committed*.—Where the forfeiture is to the crown and a subject, a common informer must sue within one year, and the crown may prosecute for the whole penalty at any time within two years after that year ended.

Note 10, page 308, line 3, words *twenty years*. No statute has fixed any limitation to a bond or specialty; but where no interest has been paid upon a bond, and no demand proved thereon for twenty years, the judges recommend it to the jury to presume it discharged, and to find a verdict for the defendant. 2 T. R. 270.

CHAPTER THE TWENTY-THIRD.

Of the Trial by Jury.

Note 1, page 351, line 18, words *sixteen jurors*.—It seems not to be ascertained that any specific number above twelve is absolutely necessary to constitute the grand assize; but it is the usual course to swear upon it the four knights and twelve others. *Vincent Trial*, X c.

See the proceedings upon a writ of right before the sixteen recognitors of the grand assize, in 3 Will. 541.

Note 2, page 356, line 17, words *born or inhabitants*.—See page 6, note 8, *ante*.

Note 3, page 357, line 21, words *last mentioned statute*.—The statute only requires ten days notice; but at the sittings in London, and Westminster, the former practice of fourteen days notice was still continued. But in all country causes ten days notice is sufficient; as where the commission day is upon the fifteenth of any month, notice of trial must be given on or before the fifth. *Impey's Prac.* 305. If the defendant resides within forty miles of London, and if the cause is to be tried at the sittings in London or Westminster, then two days notice of countermand, before it is to be tried, is sufficient. 1 *Crompt. Prac.* 220.

Note 4, page 357, line 25, words *next assizes*.—Where there have been no proceedings within four terms, a full term's notice of trial must be given previous to the assizes or sittings; (1 *Crompt. Prac.* 217.) unless the cause has been delayed by the defendant himself by an injunction or other means. 2 *Bl. Rep.* 784. 3 *T. R.* 530. If the defendant proceeds to trial by *proviso*, he must give the same notice as would have been required from the plaintiff. 1 *Crompt. Prac.* 219. Sometimes the courts impose it as a condition upon the defendant, that he shall accept *short notice* of trial, which, in country causes, shall be given at the least four days before the commission day, one day being exclusive, and the other inclusive. 3 *T. R.* 660. But in town causes, two days notice seems to be sufficient in such a case. *Tidd*, 250.

Note 5, page 358, line 8, words *trial of any issue*.—As well in indictments and informations for misdemeanors, as in civil actions. But there cannot be a special jury in cases of treason or felony, for the party must have the advantage of making twenty peremptory challenges in a prosecution for felony, and thirty-five in the case of high treason. 21 *Viner*. 301.

Note 6, page 362, line 40, words *serve upon juries*.—Upon account of the small number of freeholders in the county of Middlesex, and the frequent occasion for juries at Westminster, in that county, it was enacted by 4 *Geo. II. c. 7.* that a leaseholder for any number of years, if the improved annual value of his lease be 50l. above all ground-rents and other reservations, shall be liable to serve upon juries for that county. By the 3 *Geo. II. c. 25.* persons impanelled upon any jury within the city of London shall be householders, and possessed of some estate either real or personal of the value of 100l.

Note 8, page 365, line 8, words *principal jurors*.—Before the statute 3 *Geo. II. c. 25.* twenty-four different jurors were returned for the trial of each separate cause, in the manner of twenty-four special jurymen at present; hence the necessity of praying a *tales* from the non-attendance of twelve unexceptionable persons in each panel would frequently occur. And by the 7 & 8 *W. III. c. 32.* it was enacted, that the talesmen should be selected from those who had been summoned in other panels. But since the practice was introduced by 3 *Geo. II. c. 25.* of impannelling not less than forty-eight, nor more than seventy-two, for the trial of all common causes, the provisions of the statutes respecting a *tales*, are now confined in a great measure to special juries. If a *tales*, in default of special jurymen, is prayed, it is supplied agreeably to the 7 & 8 *W. III. c. 32.* from the panel of common jurymen. No *tales* can be prayed where all the special jurymen are absent. A *tales* may be prayed as in civil actions in cases of misdemeanor tried by writ of *habeas corpus*. 3 *St. Tr.* 57.

Note 9, page 367, line 34, words *which prove themselves*.—This rule is laid down in books of evidence without any explanation of its principle or the extent of its application. It seems absurd to permit a deed to be read merely because it bears date above thirty

years before its production; and to require no evidence where a forgery may be committed with the least probability of detection. If a subscribing witness be still living, he must be produced to prove his hand-writing, and the execution of the deed, as in other cases. 1 Bl. Rep. 532. If no subscribing witness be living, the courts, I conceive, would require the same evidence with regard to the hand-writing of the witnesses and party, as in cases of deeds of more recent date; unless, perhaps, satisfactory evidence was produced, that the deed had actually been in existence for thirty years.

Note 10, page 368, line 5, words *be allowed*.—No rule of law is more frequently cited, and more generally misconceived, than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary. But in general the want of better evidence can never justify the admission of hearsay, interested witnesses, or the copies of copies, &c. Where there are exceptions to general rules, these exceptions are as much recognized by the law as the general rule; and where boundaries and limits are established by the law for every case that can possibly occur, it is immaterial what we call the rule, and what the exception.

Note 11, page 368, line 22, words *particular facts*.—In cases of customs and prescriptive rights, hearsay or traditional evidence is not admitted until some instances of the custom or exercise of the right claimed are first proved. The declarations of parents respecting their marriage, and the legitimacy of their children, are admitted after their decease as evidence. And hearsay is also received respecting pedigrees and the death of relations abroad. Bull. N. P. 294. 2 Esp. 784. What has been said in conversation in the hearing of the other party, if not contradicted by him, may be given in evidence; for not being denied, it amounts to a species of confession. But it can only be received where it must be presumed to have been heard by the party, and therefore in one case the court stopped the witness from repeating a conversation, which had passed in a room where the witness was, but at the time whilst she had fainted away. It has been the practice of the quarter-sessions to admit the declarations of paupers respecting their settlements to be received as evidence after their death. See 3 T. R. 707. where the judges of the king's bench were divided upon the legality of this practice, and where the subject of hearsay evidence is much discussed. In criminal cases, the declarations of a person, who relates *in extremis*, or under an apprehension of dying, the cause of his death, or any other material circumstance, may be admitted in evidence; for the mind in that awful state is presumed to be as great a religious obligation to disclose the truth, as is created by the administration of an oath. But declarations of a deceased person ought not to be received, unless the court is satisfied, from the circumstances of the case, that they were made under the impression

of approaching dissolution. *Leach's case*, 400. But the declarations of a felon at the place of execution cannot be received, as he is incompetent to give evidence upon oath; and this situation is only thought equivalent to that of a competent witness, when he is sworn. *Ibid.* 276. By the 1 and 2 Ph. & Mar. c. 13. depositions taken before a justice of peace in cases of felony, may be read in evidence at the trial, if the witness dies before the trial. But as the statute confines this to felony, and as it is an innovation upon the common law, it cannot be extended to any misdemeanour. 1 *Salk.* 281.

Note 12, page 369, line 11, words *unravell'd and adjust'd*.—The entries in the book of a person deceased not connected with the parties are of no more avail than hearsay. But the book of an incumbent respecting the tithes of the parish are evidence for his successor. 5 *T. R.* 123. 4 *Ves.* 43.

Note 13, page 369, line 28, words *investigation of truth*.—The usual mode of proceeding against witnesses for disobedience of the writ of subpoena is by the summary process of an attachment for a contempt; but the courts will not grant an attachment against a witness, unless all the necessary expenses of the journey, and the witness's stay at the place of trial, be tendered at the time of serving the subpoena. *H. Bl.* 49.

Note 14, page 369, line 35, words *use of their reason*.—A Mahometan may be sworn upon the Alcoran, and a Gentoo according to the custom of India, and their evidence may be received even in a criminal case. *Leach's cases*, 52. 1 *Ark.* 21. But an Atheist, or a person who has no belief or notion of a God, or a future state of rewards and punishment, ought not in any instance to be admitted as a witness. 1 *Ark.* 45.

Note 15, page 369, line 39, word *credibility*.—"The old cases upon the competency of witnesses have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistent with authorities, to let the objection go to the credit, rather than to the competency of a witness." *Lord Mansfield*, 1 *T. R.* 300.

It seems now to be established, that a witness does not immediately gain or lose by the event of the cause, and if the verdict in the cause cannot be evidence either for or against him in any other suit, he shall be admitted as a competent witness, though the circumstances of the case may in some degree lessen his credibility. *Bent v. Baker*, 3 *T. R.* 27.

A servant of a tradesman from necessity is permitted in an action by his master to prove the delivery of goods, though he himself may have purloined them; but in an action brought against the master for the negligence of his servant, the servant cannot be a witness for his master without a release; for his master may afterwards have his action against the servant, and the verdict recovered against him may be given in evidence in that action, to prove the damage which the master has sustained. 1 *T. R.* 589.

Note 16, page 370, line 9, words *prove his own infamy*.—A witness may be examined with regard to his own infamy, if the confession of it does not subject him to any future punishment; as a witness may be asked if he has not stood in the pillory for perjury. 4 T. R. 440.

Note 17, page 370, line 13, words *trust and confidence*.—But the principles and policy of this rule restrain it to that confidence only, which is placed in a counsel or solicitor, and which must necessarily be inviolable, where the use of advocates and legal assistants is admitted. But the purposes of public justice supersede the delicacy of every other species of confidential communication. In the trial of the duchess of Kingston it was determined that a friend might be bound to disclose, if necessary in a court of justice, secrets the most sacred, which one sex could repose in the other. And that a surgeon was bound to communicate any information whatever, which he was possessed of in consequence of his professional attendance. 11 St. Tr. 243, 246. And those secrets only, communicated to a counsel or attorney, are inviolable in a court of justice, which have been entrusted to them whilst acting in their respective characters to the party as their client. 4 T. R. 431, 753.

Note 18, page 371, line 27, words *admitted to the contrary*.—This can scarcely be correct; I should conceive that proof may be admitted to repel all presumptions whatever, and even if a receipt should be produced expressly for the rent of the year 1754, still the landlord might shew that it had been obtained by mistake or fraud, and that no rent had been received at the time.

Note 19, page 371, line 38, words *validity at all*.—It is difficult to say what is a light and rash presumption, if it is any presumption at all. Any circumstance may be proved from which a fair inference can be drawn, though alone it would be too slight to support the verdict of the jury, yet it may corroborate other testimony, and a number of such presumptions may become of importance. *Possunt diversa genera ita conjungi, ut quæ singula non nocerent, ea universa tanquam grando reum opriment.* Mathæus de Crim.

Note 20, page 376, line 13, words *held to be acquitted*.—The learned Judge has displayed much learning in the beginning of this chapter, to prove the antiquity of the trial by jury; but the trials referred to by the authors there cited, and even the *judicium parium*, mentioned in the celebrated chapter of *magna charta*, are trials which were something similar to that by a jury, rather than instances of a trial by jury according to its present established form. The *judicium parium* seems strictly the judgment of a subject's equals in the feudal courts of the king and barons. And so little appears to be ascertained by antiquarians, respecting the introduction of the trial in criminal cases by two juries, that, although it is one of the most important, yet it is certainly one of the most obscure and inexplicable parts of the law of England.

The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature.

But that the life, and perhaps the liberty and property of a subject, should not be affected by the concurring judgment of a less number than twelve, where more were present, was a law founded in reason and caution; and seems to be transmitted to us by the common law, or from immemorial antiquity. The grand assize might have consisted of more than twelve, yet the verdict must have been given by twelve or more; and if twelve did not agree, the assize was adjourned, that is, others were added till twelve did concur. See 1 *Reeve's Hist. Eng. Law.* 241. 480. This was a majority and not unanimity. A grand jury may consist of any number from twelve to twenty-three inclusive, but a presentment ought not to be made by less than twelve. 2 *Hale P. C.* 161. In the high court of parliament, and the court of the lord high steward, a peer may be convicted by the greater number; yet there can be no conviction unless the greater number consists at least of twelve. 3 *Inst.* 30. *Kelyng.* 56. *Moore*, 622. Hence in all these cases if twelve only appeared, it followed as a necessary consequence, that to act with effect they must have been unanimous.

Hence this may be suggested as a conjecture respecting the origin of the unanimity of juries, that, as less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable.

Note 21, page 377, line 4, words *deliver in their verdict*.—When a verdict will carry all the costs, and it is doubtful from the evidence for which party it will be given, it is a common practice for the judge to recommend, and the parties to consent, that a juror should be withdrawn; and thus no verdict is given, and each party pays his own costs.

Note 22, page 377, line 16, words *very seldom indulged*.—A privy verdict cannot be given in treason and felony. 2 *H. P. C.* 300.

Note 23, page 382, line 36, words *preceding article*.—Where one party is in possession of papers or any species of written evidence material to the other, if notice is given him to produce them at the trial, upon his refusal copies of them will be admitted; or if no copy has been made, any parole evidence of their contents will be received. The court and jury presume in favour of such evidence; because, if it were not agreeable to the strict truth, it would be corrected by the production of the originals. There is no difference with respect to this species of evidence between criminal and civil cases. 2 *T. R.* 201.

Note 24, page 383, line 10, words *court of law*.—A court can compel the plaintiff to consent to have a witness going abroad examined upon interrogatories, or to have an absent witness examined under a commission, by the power the judges have of putting off the trial; but they have no control in these instances over the defendant.

CHAPTER THE TWENTY-FOURTH.

Of Judgment, and its Incidents.

Note 1, page 387, line 30, words *preceding ones*.—If the verdict of the jury be agreeable to equity and justice, the court will not grant a new trial, though there may have been an error in the admission of evidence or in the direction of the judge. 4 T. R. 468.

And it will not be granted merely because it has been discovered after the trial, that a witness examined was incompetent. 1 T. R. 717. But excessive damages in all cases, except in an action for adultery, are a sufficient ground to grant a new trial. 5 T. R. 257.

The court will grant any number of new trials in the same action, if the jury find verdicts contrary to the established law.

A new trial may be granted on account of the misconduct of the jury, as if they have referred to chance to determine the party for whom the verdict was given. But the courts will not hear any affidavit of such conduct from the jury themselves. 1 T. R. 17. It is generally said, that there cannot be a new trial in penal actions and criminal prosecutions, when there is a verdict for the defendant. The principle of this being the great favour which the law shews to the liberty of the subject. But the rule does not extend to information in the nature of *quo warranto*; as the object of these is now in general to try a right and not to punish an offence. 2 T. R. 484. Nor does it extend to an action upon a penal statute, in which a verdict is given for the defendant in consequence of the misdirection of the judge. 4 T. R. 753.

Note 2, page 395, line 31, words *roll or record*.—A motion in arrest of judgment may be made at any time before judgment is actually entered up. Doug. 746. Where judgment is arrested, each party pays his own costs. Cowp. 407.

If a verdict is taken generally with entire damages, judgment may be arrested if any one count in the declaration is bad; but if there is a general verdict of guilty upon an indictment consisting of several counts, and any one count is good, that is held to be sufficient. Doug. 730.

Note 3, page 397, line 38, words *complete and binding*.—The person to whom this warrant of attorney is given, has all the benefits of a judgment and execution against the debtor's person and property, without being delayed by any intermediate process, as in the case of a regular suit. It is frequently given by a person arrested upon condition of his discharge, and that longer time shall be allowed him for the payment of the debt, or that some other indulgence shall be shewn him. But to prevent persons in this situation from being imposed upon, no warrant of attorney to confess a judgment, given by a person arrested upon mesne process, shall be of any force, unless some attorney be present on behalf of the person in custody, who shall explain the nature of the warrant, and subscribe his name as a witness to it. 1 Crompt. Prac. 316.

If a warrant of attorney to confess a judgment is given unconditionally, or without delay of execution, judgment may be signed and execution may be taken out upon the same day it is given; and thus a debtor may give one creditor a preference to another, who has obtained judgment after a long litigation. 5 T. R. 235.

But if judgment is not entered within a year, the plaintiff must move the court for leave to enter up judgment upon an affidavit, stating, that the warrant has been duly executed, that the debt is unsatisfied, and that the party was living a short time before. 1 Crompt. Prac. 316.

Note 4, page 398, line 23, words *writ of inquiry*.—It has been said, by C. J. Wilmot, that "this is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages." 3 Will. 62. Hence a practice is now established in the courts of king's bench and common pleas, in actions where judgment is recovered by default upon a bill of exchange or a promissory note, to refer it to the master or prothonotary to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 T. R. 275. H. Bl. 541. In cases of difficulty and importance, the court will give leave to have the writ of inquiry executed before a judge at sittings or *nisi prius*; and then the judge acts only as an assistant to the sheriff. The number of the jurors sworn upon this inquest need not be confined to twelve; for when a writ of inquiry was executed at the bar of the court of king's bench, in an action of *scandalum magnatum*, brought by the duke of York (afterwards James the Second) against Titus Oates, who had called him a traitor; fifteen were sworn upon the jury, who gave all the damages laid in the declaration, viz. 100,000*l*. In that case the sheriffs of Middlesex sat in court covered at the table below the judges. 3 St. Tr. 987.

Note 5, page 400, line 30, words *plaintiff himself*.—If executors sue as executors for money paid to their use after the testator's death, they shall pay costs. 5 T. R. 234. When executors and administrators are defendants, they pay costs, like other persons. 2 Crompt. Prac. 476.

Note 6, page 401, line 8, words 43 Eliz. c. 6.—The 43 Eliz. c. 6. enacts, that where the plaintiff in any personal action, except for any title or interest in lands, or for a battery, recovers less than 40*s*. he shall have no more costs than damages, if the judge certifies that the debt or damages were under 40*s*. But if the judge does not grant such a certificate to the defendant, the plaintiff recovers full costs. Actions of trespass, *vi et armis*, as for beating a dog, are within the statute. 3 T. R. 38. The certificate under this statute may be granted after the trial.

This certificate is to restrain the costs; but a certificate under the 22 and 23 Car. II. c. 9, is given in favour of the plaintiff to extend them from a sum under 40*s*. to full costs. If the defendant justifies the battery, the plaintiff shall have full costs without the

judge's certificate, though the damages are under 40s.; for it is held the admission of the defendant precludes the necessity of the certificate. But a justification of the assault only will not be sufficient for this purpose; for the judge must certify an actual battery. 3 T. R. 391. This certificate must be granted at the trial. 2 Crompt. Prac. 455.

In declarations for assault and battery, there is sometimes a count for tearing the plaintiff's clothes; and if this is stated as a substantive injury, and the jury find it to have been such, and not to have happened in consequence of the beating, the plaintiff will be entitled to full costs; (1 T. R. 656.) unless the judge should assist the defendant under the 43 Eliz. c. 6. So in a trespass upon land, the carrying away or *asportavit* of any independent personal property will entitle the plaintiff to full costs, unless the asportation, as by digging and carrying away turves, is a mode or qualification of the trespass upon the land. Doug. 780.

CHAPTER THE TWENTY-FIFTH.

Of Proceedings, in the nature of Appeals.

Note 1, page 410,* line 15, words *king's bench in England*.—This appeal is taken away by 23 Geo. III. c. 28. See 1 vol. p. 104. n. 14.

Note 2, page 410,* line 22, words *king's bench and common pleas*.—The 31 Edw. III. c. 12. directs, that the chancellor and treasurer shall take to their assistance the judges of the other courts, and *autres sages come leur semblera*. But it is the practice for the two chief justices alone to sit in this court of error. 1 T. R. 511.

CHAPTER THE TWENTY-SIXTH.

Of Execution.

Note 1, page 414, line 32, words *English wives*.—Where both husband and wife are arrested upon mesne process, the court will discharge the wife upon motion and proof of the marriage on common bail, unless it is for a debt contracted since her marriage, and she has represented herself to be single; in which case the court will not assist her, but will leave her to plead her coverture. 5 T. R. 194. And where, after judgment against husband and wife, they are both rendered in discharge of bail, she shall be discharged; for they are then in the same situation as if bail had never been put in for them. 3 Wilf. 124.

Note 2, page 416, line 20, words *discharge his person*.—The creditors who can compel the surrender of the debtor's effects, and who are to have the benefit of it, are only those who have charged him in execution. This statute the 32 Geo. II. c. 28. is generally called the lords act: By the 26 Geo. III. c. 44. the provisions of it were extended to 200l. and by the 33 Geo. III. c. 5. they have

been still further enlarged to 300*l*. See the clauses of the act in 2 *Burn. tit. Gaol*.

The prisoner shall never afterwards be liable to be arrested on any action for the same debt, unless convicted of perjury. But a prisoner, to have the benefit of this act, must petition the court from which the process issued, upon which he shall be in custody, before the end of the first term after he is arrested, unless he afterwards shews his neglect arose from ignorance or mistake.

Note 3, page 417, line 30, words *one year's rent in the whole*.—But the landlord must make a demand of the rent due before the goods are removed, or he cannot have the benefit of the statute. 1 *Str.* 97. If the sheriff in levying an execution has any doubt whether the goods shewn him are the property of the defendant, he may summon a jury, and if the jury find them to be the defendant's property, the sheriff is indemnified. 4 *T. R.* 633.

Note 4, page 420, line 25, words *commenced his suit*.—If goods are taken in execution by the sheriff on a *feri facias*, against the king's debtor, and before they are sold, an extent at the king's suit issues upon a bond given to the crown, which extent bears date or *teste* after the delivery of the *feri facias* to the sheriff, the execution upon the *feri facias* shall be completed, and shall not be defeated by the extent. 4 *T. R.* 402.

CHAPTER. THE TWENTY-SEVENTH,

Of Proceedings in the Courts of Equity.

Note 1, page 426, line 25, words *appoint one*.—And the court of chancery will appoint a guardian to an infant, and allow him a suitable maintenance, on a petition, though there is no cause depending. *Ex parte Kent.* 3 *Bros. Chan. Rep.* 88. *Ex parte Salter*, *ibid.* 900. *Ex parte Whitfield.* 2 *Atk.* 315.

Note 2, page 427, line 13, words *king himself in council*.—See 1 vol. 316. n. 15.

Note 3, page 428, line 13, words *give no appeal*.—The summary jurisdiction of the court of equity, in cases of bankrupt, must be personally exercised by the chancellor, lord-keeper, or the lords commissioners of the great seal. 2 *Woodd.* 400.

Note 4, page 428, line 22, words *royal trustee*.—"Where the rights of the crown are concerned, if they extend only to the superintendence of a public trust, as in the case of a charity, the king's attorney-general may be made a party to sustain those rights; and in other cases where the crown is not in possession, a title vested in it is not impeached, and its rights only incidentally concerned; it has generally been considered, that the king's attorney-general may be made a party in respect of those rights, and the practice has been accordingly. (1 *P. Wms.* 445.) But where the crown is in possession, or any title is vested in it which

"the suit seeks to divest, or its rights are the immediate and sole object of the suit, the application must be to the king, by petition of right, (Reeve against Attorney-general, mentioned in Penn. v. lord Baltimore, 1 Ves. 445, 446.) upon which, however, the crown may refer it to the chancellor to do right, and may direct that the attorney-general shall be made a party to a suit for that purpose. The queen has also the same prerogative. (2 Roll. Abr. 213.)" *Mist. Treat. on Pleadings in Chan.*

Note 6, page 438, line 4, words *in consequence*.—The learned Judge has certainly fallen into an error, if he means to assert, that where a court of equity will grant a commission to examine witnesses, whose attendance cannot be procured to give testimony in a court of common law; it will in such case also grant relief. For though it is very usual to file a bill praying a discovery, and that a commission may be issued to examine witnesses who live abroad, no doubt can be entertained that if the bill proceeded to pray relief, and that relief was such as a court of law was fully competent to administer, a demurrer to the bill would hold, unless it was a case where the courts exercise a concurrent jurisdiction.

Note 7, page 442, line 37, words *circumstances of the case*.—An injunction in the court of exchequer stays all further proceedings, in whatever stage the cause may be; but in chancery if a declaration be delivered, the party may proceed to judgment notwithstanding an injunction, and execution is only stayed; but if no declaration has been delivered, all proceedings at law are restrained. 3 Woodl. 411.

Note 8, page 448, line 3, words *for afterwards*.—Where new matter arises after filing the bill, it cannot be introduced into the suit by amending the original bill, the issue is not joined, but must be stated in a supplemental bill. 3 Atk. 217. 1 Atk. 291.

Note 9, page 451, line 26, word *registrar*.—It is not now the practice for the registrar to read the minutes of the decree openly in court; but any party to the suit may procure a copy of them, and if there is any mistake, may move to have them amended. But after a decree has been formally drawn up and entered, no errors in it can be rectified on motion, or by any other proceeding than rehearing the cause.

Note 10, page 452, line 29, words *of a cause*.—The consent of the court ought also to be previously obtained, for a trial of a feigned issue without such consent is a contempt, which will authorize the court to order the proceedings to be stayed. 4 T. R. 402.

Note 11, page 453, line 1, words *for that purpose*.—In a late case, the master of the rolls sitting for the lord chancellor, directed a case for the opinion of the court of king's bench, saying, he thought he had authority so to do when sitting for the lord chancellor, though not when sitting at the rolls. (*Horton v. Whitaker*. 2 Bro. Chan. Ca. 88.) When a case is heard before the master of the rolls sitting in his own court, on which he wishes to have the opinion of

a court of law, he directs an action to be commenced by the parties in a court of law, in such form, that the question on which he has a doubt may be decided in that suit, and suspends his decree till the court of law has given its judgment. The court of exchequer is both a court of law and a court of equity; (*v. ent. 43.*) therefore if a question of mere law arises in the course of the exercise of its equitable jurisdiction, the barons will decide upon it in that suit without referring it to another jurisdiction,

MR. CHRISTIAN'S NOTES
TO
BLACKSTONE'S COMMENTARIES.
BOOK THE FOURTH
OF PUBLIC WRONGS.
CHAPTER THE FIRST

Of the Nature of Crimes; and their Punishment.

Note 1, page 4, line 30, word *Egyptians*.—THE 5 Eliz. c. 20, which introduced this crime and its severe punishment, is repealed by the 23 Geo. III. c. 51.

Note 2, page 5, line 20, words *misdemeanours only*.—In the English law *misdemeanour* is generally used in contradistinction to *felony*, and *misdemeanours* comprehend all indictable offences, which do not amount to felony; as perjury, battery, libels, conspiracies, &c.

Note 3, page 5, line 38, word *impunity*.—The distinction between public crimes and private injuries seems entirely to be created by positive laws, and it is referable only to civil institutions. Every violation of a moral law, or natural obligation, is an injury, for which the offender ought to make retribution to the individuals who immediately suffer from it; and is also a crime, for which he ought to be punished to that extent, which would deter both him and others from a repetition of the offence. In positive laws those acts are denominated injuries, for which the legislature has only provided retribution; or a compensation in damages; but when from experience it is discovered that this is not sufficient to restrain within moderate bounds certain classes of injuries, it then becomes necessary for the legislative power to raise them into crimes, and to endeavour to repress them by the terror of punishment, or the sword of the public magistrate.

Note 4, page 9, line 26, words *to civil society*.—It is strange that the learned Judge's conclusion, viz. that *theft itself is not an offence against natural rights*, did not lead him to suspect the fallacy of the position, that *the right of property owes its origin not to the law of nature*.

but merely of civil society, which he has also advanced in a former volume, (2 vol. p. 11.) and which I have there presumed to controvert. If theft is not a violation of the law of nature and reason, it would follow that there is no moral turpitude in dishonesty.

Thou shalt not steal, is certainly one of the first precepts both of nature and religion.

CHAPTER THE SECOND.

Of the Persons capable of committing Crimes.

Note 1, page 25, line 1, words *judgment or execution*.—If the punishment were less than death, and were inflicted upon a prisoner deprived of reason, it would be unproductive of one of the great ends of punishment, the correction of the criminal. Human tribunals are only justified in introducing the pain and evil of punishment, when it is likely to prevent that greater degree of evil, which would result from the unrestrained commission of crimes.

Note 2, page 25, line 33, words *proper homes*.—Where it is dangerous to permit a lunatic to go abroad, two justices may order him to be apprehended and secured, even with chains, if necessary, and may send him by a vagrant pass to the place of his settlement; and may order so much of his goods to be sold, or the rents of his lands to be received, as will discharge the expense incurred; but such sum must be accounted for at the next sessions: but this does not preclude the jurisdiction of the chancellor, or prevent any relation or friend from taking the lunatic under his care. 17 Geo. II. c. 5, §. 21.

Note 3, page 27, line 10, words *first misbehaviour*.—But a very important distinction is made in such cases, viz. whether the unlawful act is also in its original nature wrong and mischievous, for a person is not answerable for the incidental consequences of an unlawful act, which is merely a *malum prohibitum*; as where any unfortunate accident happens from an unqualified person being in pursuit of game, he is amenable only to the same extent as a man duly qualified. Foss. 259. 1 Hale, P. C. 475.

Note 4, page 29, line 12, words *and the like*.—The law seems to protect the wife in all felonies committed by her in company with her husband, except murder and manslaughter. 1 Hal. P. C. 47.

Note 5, page 30, line 14, words *in the time of peace*.—The fear of having houses burnt or goods spoiled is no excuse in the eye of the law for joining and marching with rebels. The only force that doth excuse is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent upon men, who make force their defence, to shew an actual force, and that they joined *pro timore mortis, et excesserunt quam cito potuerunt*. Foss. 14. 216.

CHAPTER THE THIRD.

Of Principals and Accessories.

Note 1, page 38, line 19, words *for fourteen years*.—See more upon this subject in p. 132.

CHAPTER THE FOURTH.

Of Offences against God and Religion.

Note 1, page 59, line 3, words *teachers of youth*.—But now by the statute 31 Geo. III. c. 32. which may be called the toleration act of the Roman Catholics, all the severe and cruel restrictions and penalties, enumerated by the learned Judge, are removed from those Roman Catholics, who are willing to comply with the requisitions of that statute, which are, that they must appear at some of the courts of Westminster, or at the quarter sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the Roman Catholic Religion, and also an oath which is exactly similar to that required by the 18 Geo. III. c. 60. the substance of which is stated above in the text. Of this declaration and oath being duly made by any Roman Catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within the year in his respective court. The statute then provides, that a Roman Catholic, thus qualified, shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a Papist, nor for attending or performing mass or other ceremonies of the church of Rome; provided that no place shall be allowed for an assembly to celebrate such worship until it is certified to the sessions; nor shall any minister officiate in it, until his name and description are recorded there. And no such place of assembly shall have its doors locked or barred during the time of meeting or divine worship.

And if any Roman Catholic whatever is elected constable, churchwarden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. But every minister, who has qualified, shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on Sundays, shall continue in force, except where persons attend some place of worship allowed by this statute, or the toleration act of the dissenters, &c. W. & M.

And if any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the next sessions, and upon conviction there, shall forfeit twenty pounds.

But no Roman Catholic minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church,

or church-yard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house, where there shall not be more than five persons besides the family. This statute shall not exempt Roman Catholics from the payment of tithes, or other dues, to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the crown. No person, who has qualified, shall be persecuted for instructing youth, except in an endowed school, or a school in one of the English universities; and except also, that no Roman Catholic schoolmaster shall receive into his school the child of any Protestant father; nor shall any Roman Catholic keep a school until his, or her, name be recorded as a teacher at the sessions.

But no religious order is to be established; and every endowment of a school or college by a Roman Catholic shall still be superstitious and unlawful. And no person henceforth shall be summoned to take the oath of supremacy, and the declaration against transubstantiation. Nor shall Roman Catholics, who have qualified, be removable from London and Westminster; neither shall any peer, who has qualified, be punishable for coming into the presence, or palace of the king or queen. And no Papists whatever shall be any longer obliged to register their names and estates, or enrol their deeds and wills. And every Roman Catholic, who was qualified, may be permitted to act as a barrister, attorney, and notary.

Note 2, page 59, line 16, words *election shall be void*.—By the 5 Geo. I. c. 6. § 3. the election into a corporate office shall not be void on account of the person elected having omitted to receive the sacrament within a year before the election, unless he shall be removed within six months after his election, or unless a prosecution be commenced within that time, and be carried on without delay; and during that time the office is not void, but only voidable; and the person elected, until a removable or prosecution within the time limited, is entitled to all the incidental rights of his office in as full extent as if he had actually received the sacrament within a year previous to his election. 2 Burr. 1016.

Note 3, page 59, line 21, words *the same time*.—The 25 Car. II. c. 2. The original test act required, that both the sacrament and the oaths should be taken within three months; and by subsequent statutes, the time for taking the oaths has been enlarged to six months; but the time for taking the sacrament remains unaltered, which must still be taken within three months after admission into the office.

Note 4, page 59, line 28, word *office*.—But before the end of every session of parliament, an act is passed to indemnify all persons who have not complied with the requisition of the corporation and test acts, provided they qualify themselves within a time specified in the act; and provided also, that judgment in any action or prosecution has not been obtained against them for their former omission.

Note 5, page 60, line 15, words *laws of England*.—*Scripture est common ley, s. quel tous manieres de lois sont fondees.* 34 H. VI. 40.

Note 6, page 60, line 29, word *convict him*.—The conviction must be within eight days after the offence, § 12. Each oath or curse being a distinct complete offence, there can be no question, I conceive, but a person may incur any number of penalties in one day, though Dr. Burn doubts whether any number of oaths or curses in one day amount to more than one offence. 3 Burn, 325.

Persons belonging to his majesty's navy, if guilty of profane cursing and swearing, are liable to suffer such punishment as a court martial shall think proper to inflict. 22 Geo. II. c. 33.

Note 7, page 61, line 31, words *or enchantment*.—This act is said to have passed in consequence of a ~~old~~ woman's being drowned at Tring in Hertfordshire, by her too credulous neighbours who suspected her of witchcraft. In Ireland there is still a statute inflicting capital punishment upon witches, unrepealed. It was passed in the 28th Eliz. and it describes every species of the crime as minutely as the English statute, 1 Jac. I. c. 12. ; and it even provides for the trial of peers, who might happen to be charged with that crime. 1 *Ld. Mountm. Hist. Irish Parliament*.

Note 8, page 63, line 22, words *corrupt consideration*.—Any resignation or exchange for money is corrupt, however apparently fair the transaction ; as where a father wishing that his son in orders should be employed in the duties of his profession, agreed to secure, by a bond, the payment of an annuity exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son. The annuity being afterwards in arrear, the bond was put in suit, and the defendant pleaded the simoniacal resignation in bar ; and lord Mansfield and the court, though they declared that it was an unconscientious defence, yet as the resignation had been made for money, determined, that it was corrupt and simoniacal, and in consequence that the bond was void. Young v. Jones, 8. T. 1782.

Note 9, page 64, line 32, words *twenty shillings*.—Goods exposed to sale upon a Sunday are forfeited to the use of the poor, except that one-third may be allowed the informer ; but milk may be sold before nine in the morning, and after four in the afternoon. 29 Car. II. c. 7. Mackarel also may be sold on Sundays before and after divine service. 10 & 11 W. c. 24.

Forty watermen are permitted to ply upon the Thames betwixt Vauxhall and Limehouse on Sundays. 11 & 12 W. c. 21. Fifth carriages are allowed to travel on Sundays either laden or returning empty. 2 Geo. III. c. 15. Persons exercising their calling on a Sunday are only subject to one penalty ; for the whole is but one offence, or one act of exercising, though continued the whole day. *Cowp.* 640.

Bakers were permitted to dress dinners on a Sunday as a work of necessity. 5 T. R. 449. But by the 34 Geo. III. c. 61. every baker shall be subject to a penalty of 10s. to the use of the poor for exercising his business in any manner as a baker, except that he may sell bread between nine o'clock in the morning and one in the

afternoon; and may also within that time bake meat, puddings, and pies for any person, who shall carry or send the same to be baked. The 21 Geo. III. c. 49. was passed to restrain an indecent practice, which had become very prevalent in London and Westminster; it enacts, that if any house, room, or place is opened upon a Sunday for any public entertainment, or for debating upon any subject whatever, to which persons are admitted by money or tickets, the keeper of it shall forfeit 200*l.* to any person who will prosecute; the manager or president 100*l.* and the receiver of the money or tickets 50*l.*; and every person advertising, or printing an advertisement of, such a meeting, shall in like manner forfeit 50*l.* for every offence.

Note 10, page 64, line 34, words *in the stocks*.—i. e. If he is not able to pay the penalty of 5*l.*

Note 11, page 64, line 39, words *permitting them*.—No license shall be granted to any person to keep an alehouse, but by two justices, at a public meeting of the magistrates of the county, division, or place, in which the house is situated, and this must be done by the consent of the majority present. The time and place of such public meeting must be appointed by two of the magistrates at least ten days previous to the meeting, which shall be held every year, either on the 1st of September, or within twenty days afterwards. The license must be renewed every year; and no license shall be originally granted to any one, unless he produce a certificate signed by the minister of the parish, and the majority of the church wardens or overseers; or a certificate signed by three or four respectable householders, testifying that the person applying is a person of good character. 26 Geo. II. c. 31. 1 Burr. 556.

Where an alehouse-keeper dies or removes, if his executor, administrator, assign, or the new tenant obtains such a certificate within thirty days after the death, or removal, or entry into the empty house, and produces it to the magistrates at the next petty sessions, they may, if they think proper, grant him a license, until the next general licensing day. And till the next petty sessions, such person is indemnified for keeping the house open as an alehouse, provided he obtains his certificate within the time limited, though he is afterwards refused a license. 32 Geo. III. c. 59.

This statute, 32 Geo. III. c. 59. seems to include, though not clearly expressed, alehouses within corporations. But by 26 Geo. II. c. 31. persons not licensed the year before, need not produce certificates; and the general meeting for granting licenses need not be held in September. 3 T. R. 560. Every person licensed must enter into a recognizance of 10*l.* with two sureties in 5*l.* each, for his good behaviour. And persons selling ale without a license, are subject to severe penalties. No person can sell spirituous liquors or wine, by retail, under a license from the commissioners of excise, without having also a license to sell ale from the justices. 5 Geo. III. c. 46. 32 Geo. III. c. 59. 3 T. R. 560.

Justices of the peace have an absolute and uncontrolled power and discretion in granting and refusing ale licenses; but if, it should

appear from their own declarations, or the circumstances of their conduct, that they have either refused or granted a license from a partial or corrupt motive, they are punishable in the court of King's Bench by information, or they may be prosecuted by indictment. 1 Burr. 556. 1 T. R. 690. See the laws respecting ale-houses more fully stated in 1 Burn, tit. *Alehouse*.

Note 12, page 65, line 2, words *and imprisonment*.—Many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. But except those appropriated cases, the court of King's Bench is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*. 3 Burr. 1438. In that court a gentleman was fined 2000 marks and imprisoned for exposing himself naked in a public street. 1 Sid. 168. And an information has been granted against a number of persons concerned in assigning a young girl as an apprentice to a gentleman, under pretence of learning music, but for the purposes of prostitution. 3 Burr. 1438. There is also an instance of an information for a conspiracy against a peer and several others for enticing away a young lady from her father's house, and procuring her seduction by the peer. The young lady was the sister of his wife. That circumstance was undoubtedly a great aggravation of the offence; yet its existence in the case was not necessary to give the court cognizance of the prosecution. 3 St. Tr. 519. And all such acts of indecency and immorality are also punishable by indictment in any criminal court as public misdemeanours.

CHAPTER THE SIXTH

Of High Treason.

Note 1, page 79, line 5, words *or overt-act*.—In the case of the regicides, the indictment charged, that they did traiterously compass and imagine the death of the king. And the taking off his head was laid, among others, as an overt-act of compassing. And the person who was supposed to have given the stroke was convicted on the same indictment. *Fost.* 194.

Note 2, page 79, line 31, words *high treason*.—Mr. J. Foster lays down generally that "the care the law hath taken for the personal safety of the king, is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aimed at his life. It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered." *Fost.* 195.

Note 3, page 80, line 4, words *in the king's belly*.—There was even a refinement and degree of subtlety in the cruelty of that case, for he wished it, horns and all, in the belly of him who counselled the king to kill it; and as the king killed it of his own accord, or was his own counsellor, it was held to be a treasonable wish against the king himself. 1 Hal. P. C. 115.

Note 4, page 80, line 25, words *will be treason*.—This subject is fully and ably discussed by Mr. J. Foster, who maintains that words alone cannot amount to an overt-act of treason; but if they are attended or followed by a consultation, meeting, or any act, then they will be evidence, or a confession, of the intent of such consultation, meeting, or act; and he concludes, that "loose words" not relative to facts, are at the worst no more than bare indications of the malignity of the heart." *Fost. 202. et seq.*

Note 5, page 81, line 24, words *to be no treason*.—But the instances specified in the statute do not prove much consistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king, though their issue must inherit the crown before the issue of the king's eldest daughter, and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate.

Before the 25 Ed. III. it was held to be high treason not only to violate the wife and daughters of the king, but also the nurses of his children, *les nurses de leur enfantz*. *Britt. c. 8.*

Note 6, page 81, (last line) words *real or pretended*.—Lord Mansfield declared upon the trial of lord George Gordon, that it was the unanimous opinion of the court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the king, and high treason. *Doug. 570.*

Note 7, page 82, line 37, word *intelligence*.—Sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us, or in defence of themselves, is high treason, although such correspondence should be intercepted. *Dr. Hensley's case, 1 Burr. 650.*

Note 8, page 84, (last line) words *W. & M. c. 21*.—By the statute 7 Ann. c. 21. it is made high treason to slay any of the lords of session, or lords of justiciary, sitting in judgment; or to counterfeit the king's seals appointed by the act of union. This statute 7 Ann. c. 21. has also enacted that the crimes of high treason and misprision of treason shall be exactly the same in England and Scotland; and that no acts in Scotland, except those above specified, shall be construed high treason in Scotland, which are not high treason in England.

And all persons prosecuted in Scotland for high treason, or misprision of treason, shall be tried by a jury, and in the same manner as if they had been prosecuted for the same crime in England.

Note 9, page 92, line 29, words *populi vox Dei*.—By the statute 33 Geo. III. c. 27. called, the Traiterous Correspondence Act, it is enacted, that if any person residing in Great-Britain, shall, during the present war with France, either on his own account or on account of any other person whatsoever, buy, sell, procure, send, or assist in so doing, for the use of the French armies, or of any person resident within the dominions of France, any ordnance stores, iron, lead, or copper, except cutlery ware not being arms, and except buttons, buckles, japanned wares, toys and trinkets; or any bank notes,

gold or silver; or any provisions whatever; or any clothing for the armies or fleets; or any leather, wrought or unwrought, without license from the king or privy council, he shall be guilty of high treason. And every British subject who shall purchase, or enter into any agreement for, any land or real property in France, shall also be guilty of high treason: And if any British subject shall voluntarily go, or embark in any vessel with intent to go, from any place in Great-Britain, into any part of France, without a license, he shall be liable to be imprisoned for six months. And every insurance upon property and articles, which are as above prohibited to be sent from England to France, belonging to French subjects, upon any voyage whatever, or upon the same articles upon any voyage from any part of the world to any port in France, shall be null and void; and every person making such an insurance shall be subject to imprisonment for three months.

Note 10, page 93, line 29, words *burned alive*.—But now by the Statute 30 Geo. III. c. 48. women convicted in all cases of treason, shall receive judgment to be drawn to the place of execution, and there to be hanged by the neck till dead.

CHAPTER THE SEVENTH.

Of Felonies injurious to the King's Privileges.

Note 1, page 96, line 3, words *escheats to the lord*.—But a forfeiture of land is not a necessary consequence of felony; for petit larceny is felony, which does not produce a forfeiture of lands; but every species of felony is followed by a forfeiture of goods and personal chattels.

CHAPTER THE EIGHTH.

Of Praemunire.

Note 1, page 103—See note *praemonevi*.—*Praemunio*, in law latin, is used in all its tenses and participles, for *praemonere* or *cito*. DUCANGE Gloss.

Note 2, page 117, line 3, words *of a praemunire*.—By the 31 Geo. III. c. 32. s. 18. it is enacted, that no person shall be summoned to take those oaths, or be prosecuted for not obeying such summons.

Note 3, page 118, (last line) words *aid or relief*.—The terrible penalties of a *praemunire* are denounced by a great variety of statutes, yet prosecutions upon a *praemunire* are unheard of in our courts.

There is only one instance of such a prosecution in the State Trials, in which case the penalties of a *praemunire* were inflicted upon some persons for refusing to take the oath of allegiance in the reign of Charles the Second. *Harg. St. Tr.* 2 vol. 463.

CHAPTER THE NINTH.

Of Missprisions and Contempts, affecting the King and Government.

Note 1, page 124, line 12, words *see for the same*.—See page 59-note 3.

Note 2, page 124, line 28, words *a felon*.—See page 116-note 1.

Note 3, page 125, line 7, words *statute at length*.—Mr. Hargrave has given in the 11 vol. of the State Trials, p. 16. an extract from Stowe's Annals, containing a very curious account of the circumstances of the trial of sir Edmund Knevet, who was prosecuted upon this statute, soon after it was enacted, "for which offence he was not only judged to lose his hand, but also his body to remain in prison, and his lands and goods at the king's pleasure. Then the said sir Edmund Knevet desired that the king, of his benigne grace, would pardon him of his right hand, and take the left : for (quoth he) if my right be spared, I may hereafter doe such good service to his grace as shall please him to appoint. Of this submission and request the justices forthwith informed the king, who of his goodneis, considering the gentle heart of the said Edmund, and the good report of lord and ladies, granted him pardon, that he should lose neither hand, land, nor goods, but should go free at liberty."

CHAPTER THE TENTH

Of Offences against Public Justice.

Note 1, page 132, line 11, words *port of transportation*.—It has been thought that, where a convict has been pardoned upon condition of transporting himself for life or a certain number of years, if he did not comply with that condition, he might be remitted to his original sentence, and in some cases that he was subject to no other punishment. See *Leach's Crown Cases*, 197. 303. But the 24 Geo. III. c. 56. seems to include every possible case, by enacting, that if any offender shall be ordered by the court to be transported, or shall agree to transport himself on certain conditions, either for life or any number of years, and shall be afterwards at large before the expiration of the term, without lawful cause, in any part of Great-Britain or Ireland, he shall, being lawfully convicted thereof, suffer death without benefit of clergy.

Note 2, page 133, line 25, words *for fourteen years*.—By the common law, the receiving of stolen goods was a misdemeanour, but by the 3 W. & M. c. 9. the buyer or receiver of stolen goods was made an accessory after the fact, and from that time the common law misdemeanour became merged in the felony. By the 4 Geo. I. c. 11. persons convicted of buying or receiving stolen goods, knowing them to be stolen, may be transported for fourteen years. But this statute has a reference to the former statutes, by which receivers are made accessories, and as there can be no accessories to

petty larceny, this statute has operation only in cases where the principal is previously convicted of grand larceny. *Fost.* 73. 378. And as these statutes did not extend to the receivers of stolen goods, where the principal was guilty only of a petty larceny, the 22 Geo. III. c. 5. was passed, which comprehends all descriptions of receivers whatever, it expressly excepts the receivers of lead, iron, copper, brass, bell-metal, and solder, who are punishable by 29 Geo. II. c. 30. by transportation for fourteen years, and also the case where the principal has been convicted of grand larceny, in that instance the receiver must still be prosecuted as an accessary to the felony; and by the 4 Geo. I. c. 11. may be transported for fourteen years. But in every other instance, whether the principal has committed petty larceny, grand larceny, or some greater offence, the receiver may be prosecuted for a misdemeanour, and be punished by fine, imprisonment, or whipping, whether the principal felon be, or be not, convicted, or be, or be not, amenable to justice. And every person, under fifteen years of age, guilty of any felony within benefit of clergy, shall be entitled to a pardon, if he makes such a discovery as produces the conviction of two persons guilty of buying or receiving stolen goods. It has been determined that money and bank notes are not goods within the meaning of these statutes. *Leach.* 208. 368. Upon the trial of the receiver, the principal felon may be admitted a witness. *Leach.* 325. When the 3 & 4 W. & M. c. 9. had made the receiver of stolen goods an accessary after the fact, his punishment in the case of grand larceny, was the same as that of the principal, *viz.* burning in the hand, and imprisonment not exceeding a year; but the punishment of the principal by the 4 Geo. I. c. 11. might be changed at the discretion of the court into transportation for seven years; but it seems to be understood that the clause respecting the receiver is peremptory, and that the court is obliged to sentence him to transportation for fourteen years. *Fost.* 73. But the words of the statute are, that *it shall and may be lawful* for the court to order receivers to be transported for fourteen years, which seem to leave it still to the discretion of the judge, whether he will inflict this or the former punishment of burning in the hand upon the offender.

Note 3, page 136, line 28, words *public good*.—But this severe statute extends even to penal actions, where the whole penalty is given to the prosecutor.

Note 4, page 137, line 10, words *fine and pillory*.—Every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy. Journeymen who refuse to work, in consequence of a combination, till their wages are raised, may be indicted for a conspiracy. 1 *Leach. Hawk.* 348. One person alone cannot be guilty of a conspiracy; but one person may be prosecuted for having conspired with others, and may be tried and convicted alone. 1 *Str.* 193. In a prosecution for a conspiracy, the actual fact of conspiring need not be proved, but it may be inferred from circumstances, and the concurring conduct of the defendants. 1 *Bl. Rep.* 392. A conspiracy has been said

be comprehended under the denomination of *crimen falsi*, and a person convicted of it is held to be rendered an incompetent witness. *Leach*. 349. But will this principle apply to confederacies, the designs of which are not to injure by fraud or falsehood, but by open violence?

Note 5, page 137, line 33, words *breach of them*.—It is remarkable that the house of commons have no power to administer an oath, except in those particular instances in which that power is granted to them by express acts of parliament. It is supposed that the reason they have never obtained the general authority of administering an oath, is owing to the jealousy of the upper house, which, by securing this privilege to itself, prevents the commons from participating in the judicature of parliament.

Note 6, page 136, line 7, words *oaths before mentioned*.—A man may be indicted for perjury in swearing that he believes a fact to be true, which he must know to be false. *Leach*. 270.

Note 7, page 139, line 26, words *humana dedecus*.—See this subject further discussed in p. 196. *post*.

Note 8, page 140, line 27, words *this sordid vice*.—It was held to be a misdemeanour to offer a sum of money to the first lord of the treasury, for the purpose of obtaining an office or appointment under government, by his interest and recommendation. 4 *Burr*. 2498. For bribery at elections, see 1 vol. p. 182.

Note 9, page 141, line 27, words *offence committed*.—For actions and prosecutions against justices of the peace, see 1 vol. p. 373. n. 17.

CHAPTER THE ELEVENTH.

Of Offences against the Public Peace.

Note 1, page 143, line 37, words *without benefit of clergy*.—And in another clause of the same act, persons injured by any buildings being demolished by a riotous assembly, may recover damages in an action against the hundred. And it was determined after the riots in 1780, that the owners of houses might recover damages also for the destruction of furniture, or for any injury to their property, done at the same time that the buildings were demolished, or were in part pulled down. *Doug*. 673.

Note 2, page 144, line 24, words *without benefit of clergy*.—The words of these statutes are, *shall knowingly send*, and therefore it has been determined if the writer of a threatening letter delivers it himself, he is not guilty of felony. *Leach*. 351.

Note 3, page 144, line 23, words *seven years*.—This statute of 1 Geo. II. st. 2. c. 19. after several continuances, was suffered to expire in 1748.

Note 4, page 145, line 9, words *adjacent county*.—The statute of 7 Geo. III. c. 40. is repeated by the 13 Geo. III. c. 84. by which the offence described in the former statute is made felony, punishable at the discretion of the court by transportation for seven years, or imprisonment for any time not exceeding three years.

And this is extended by the 21 Geo. III. c. 20. to all acts subsequent to the 13 Geo. III. which had been, or should in future be, passed for amending and repairing any particular turnpike road in England.

Note 5, page 151, line 26, words *quality of the offender*.—Though it has been held, at least for these two centuries, that the truth of a libel is no justification in a criminal prosecution, yet in many instances it is considered an extenuation of the offence; and the court of King's Bench has laid down this general rule, *viz.* that it will not grant an information for a libel, unless the prosecutor, who applies for it, makes an affidavit, asserting directly and pointedly, that he is innocent of the charge imputed to him. But this rule may be dispensed with, if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament. *Doug.* 271. 372.

It had frequently been determined by the court of King's Bench, that the only questions for the consideration of the jury, in criminal prosecutions for libels, were the fact of publication, and the truth of the innuendos, that is, the truth of the meaning and sense of the passages of the libel, as stated and averred in the record, and that the judge or court alone were competent to determine whether the subject of the publication was or was not a libel. See the case of the Dean of St. Asaph, 3 T.R. 428. But the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60. was passed, intitled *An act to remove doubts respecting the functions of juries in cases of libels*. And it declares and enacts, that on every trial of an indictment or information for a libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter in issue, and shall not be required or directed by the judge, to find the defendant guilty, merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it in the record. But the statute provides, that the judge may give his opinion to the jury respecting the matter in issue, and the jury may at their discretion, as in other cases, find a special verdict, and the defendant, if convicted, may move the court, as before the statute, in arrest of judgment. A person may be punished for a libel reflecting on the memory and character of the dead, but it must be alleged, and proved to the satisfaction of the jury, that the author intended by the publication to bring dishonour and contempt on the relations and descendants of the deceased. 4 T. R. 126. The sale of the libel by a servant in a shop, is *prima facie* evidence of publication in a prosecution against the master, and is sufficient for conviction, unless contradicted by contrary evidence, shewing that he was not privy, nor in any degree assenting to it. *Ibid.* & 5 Burr. 2686. When a person is brought to receive judgment for a libel, his conduct, subsequent to his conviction, may be taken into consideration, either by way of aggravation or mitigation of the punishment. 3 T. R. 432.

CHAPTER THE TWELFTH.

Of Offences against Public Trade.

Note 1, page 155, line 8, words *penalties be not paid*.—By the 28 Geo. III. c. 38. all the former statutes, respecting the exportation of sheep and wool are repealed, and an infinite variety of regulations and restrictions upon the subject is consolidated in that statute, which it behoves the dealers in, and carriers of, wool to pay particular attention to. It is given almost at length in the 4th vol. of *Burn*, tit. Woollen Manufacture, c. II. but as it contains near one hundred long clauses, it is impossible to give any adequate representation of it in an abridgment. The principal prohibitions are, that if any person shall send or receive any sheep on board a ship or vessel, to be carried out of the kingdom, the sheep and vessel are both forfeited, and the person so offending shall forfeit 3*l*. for every sheep, and shall suffer solitary imprisonment for three months. But whether sheep, by a license from the collector of the customs, may be taken on board for the use of the ship's company. And every person, who shall export out of the kingdom, any wool, or woollen articles slightly made up, so as easily to be reduced to wool again, or any fuller's earth, or tobacco-pipe clay, and every carrier, ship owner, commander, mariner, or other person, who shall knowingly assist in exporting, or in attempting to export, these articles, shall forfeit 3*s*. for every pound weight, or the sum of 50*l*. in the whole, at the election of the prosecutor, and shall also suffer solitary imprisonment for three months. But wool may be carried coastwise upon being duly entered, and security being given, according to the directions of the statute, to the officer of the port from whence the same shall be conveyed. And the owners of sheep, which are shorn within five miles of the sea, or within ten miles in Kent and Sussex, cannot remove the wool without giving notice to the officer of the nearest port, as directed by the statute.

Note 2, page 156, line 3, words *penalty of death*.—But the 19 Geo. III. c. 69. sec. 23. has expressly declared that the *method of apprehending* the offenders described in the 19 Geo. II. c. 34. and of *causing them to surrender*, is continued by all the statutes, which have continued the 19 Geo. II. c. 34. and it is also recited at length in the 24 Geo. III. sess. 2. c. 47. and is there directed to be enforced for procuring the apprehending of the capital felons described by that statute, who are persons who shall maliciously shoot into any ship or boat, or at any custom-house officer or his assistant, in the execution of his duty, either on shore or within four leagues of it.

It is equivalent to an attainder by outlawry, and is thus described. When any person shall be charged with any the said offences, before a justice of the peace, by information on oath, the justice shall certify the same under his hand and seal, and return the information to a secretary of state, who shall lay the same before the king in council; who may thereon make his order, commanding the offender to surrender in forty days after the first publication

thereof in the gazette, to one of the judges of the king's bench or a justice of the peace, who thereon shall commit him to gaol, to answer the charge against him according to due course of law: which order the clerks of the privy council shall cause to be forthwith published in the two successive gazettes, and to be transmitted to the sheriff where the offence was committed; who shall in fourteen days cause the same to be proclaimed between ten in the morning and two in the afternoon, in the market places, on the market days, of two market towns in the same county, near the place where the offence was committed; and a copy of the order shall be affixed on some public place in the said towns: and if such offender shall not surrender pursuant to such order, or escape after surrender, he shall be attainted of felony without benefit of clergy. See an instance in *Fost. 51.* where the attorney-general prayed the judgment of the court of king's bench under this statute; but the prisoner was discharged, because the directions of the statute had not been duly observed.

Note 3, page 152, line 9, words *benefit of his creditors*.—By the 33 Geo. III. c. 5. the debt is enlarged to 300*l.*

Note 4, page 158, line 28, words *the money borrowed*.—One half of the penalty is given by the statute to the prosecutor, the other half to the king.

It is not necessary, that money should be actually advanced to constitute the offence of usury, but any contrivance or pretence whatever to gain more than legal interest, where it is the intent of the parties to contract for a loan, will be usury; as where a person applies to a tradesman to lend him money, who, instead of cash, furnishes him with goods, to be paid for at a future day, but at such an exorbitant price, as to secure to himself more than legal interest upon the amount of their intrinsic value, this is an usurious contract. The question of usury, or whether a contract is a colour and pretence for an usurious loan, or is a fair and honest transaction, must, under all its circumstances, be determined by a jury, subject to the correction of the court by a new trial. *Corup. 112. 770. Doug. 708. 3 T. R. 531.*

It is now clearly settled that bankers and other persons discounting bills, may not only take 5*l. per cent.* for interest, but also a reasonable sum besides, for their trouble and risk in remitting cash, and for other incidental expenses. *3 T. R. 52.* But still whether such a charge is reasonable or usurious, must be decided by a jury, assisted by the direction of the judge. If a contract is entered into, to pay more than legal interest, though all securities are immediately void, yet the penalty is not incurred till more than legal interest is actually paid. *Doug. 222.* The borrower may be produced to prove the usury in an action for the penalty, if he swears that he has repaid the sum borrowed. *4 Burr. 2251.*

See more upon usury, 1 vol. p. 490.

Note 5, page 159, line 4, words *as the court shall direct*.—In an indictment for this offence, the false pretences must be particularly stated and specified. *The King v. Mason, 2 T. R. 581.*

Note 6, page 159,* line 14, words *new inventions*.—See an account of patents for new inventions, 2 vol. p. 411. n. 7.

Note 7, page 160,* line 3, words *forty shillings by the month*.—See this subject more fully stated in 1 vol. p. 454. n. 7. and p. 443. n. 7.

Note 8, page 160,* (last line) figures 200*l*.—By the stat. 21 Geo. III. c. 3. if any person shall put on board any ship, not bound to any place in Great-Britain or Ireland, or shall have in his custody, with intent to export, any engine, tool, or implement, used in the woollen, cotton, linen, or silk manufactures, he shall forfeit the same, and also the sum of 200*l*. and shall be imprisoned twelve months, and till the forfeiture is paid. And every captain and custom-house officer, who shall knowingly receive such an article, or take an entry of it, shall forfeit 200*l*. And by 22 Geo. III. c. 60. if any person shall entice or encourage any artificer, employed in printing calicoes, cottons, muslins, or lincens, to leave the kingdom, he shall forfeit 500*l*. and be imprisoned one year. And persons who export, or attempt to export, any engines or implements used in that manufacture, shall forfeit 500*l*. And captains of ships and custom-house officers, conniving at these offences, forfeit 100*l*. and become incapable of holding any office under the crown.

And by the 25 Geo. III. c. 67. any person, who entices or encourages an artificer in the iron and steel manufactures, to leave the kingdom, shall forfeit 500*l*. and be imprisoned for one year. And persons who attempt to export any instruments specified by name in the 26 Geo. III. c. 89. shall forfeit 200*l*. and be imprisoned one year. And captains and custom-house officers, conniving at the offence, are subject to the same penalty, and become incapable of exercising any public employment.

CHAPTER THE THIRTEENTH.

Of Offences against the Public Health, and the Public Police or Economy.

Note 1, page 161, line 25, words 29 Geo. III. c. 3.—And further enforced and regulated by 28 Geo. III. c. 34.

Note 2, page 162, line 5, words *performing quarantine*.—If the captain quits the ship himself, or permits any other person to quit it, he forfeits 500*l*. and every other person quitting it shall suffer six months imprisonment, and shall forfeit 200*l*. It has been decided in a late case that if a pilot leaves the ship contrary to an order of the king in council, though perhaps liable to the last mentioned penalty, yet under the first clause of 26 Geo. II. c. 6. which contains a general prohibition without any specific penalty, he may be punished at the discretion of the court; and in that case the defendant was ordered to be imprisoned for a year, 4 T. R. 206. See the regulations and directions, which are numerous, for the performance of quarantine, in 3 Burn. tit. Plague.

Note 3, page 164, line 26, words *ecclesiastical court*.—But if a person marries again under the three first exceptions, though the second

marriage is not felony, yet as before the statute it is null and void, and the parties will be subject to the censures and punishment of the ecclesiastical courts.

Note 4, page 164, line 28, words *a vinculo*.—In the duchess of Kingston's case the judges were unanimously of opinion, "That a sentence in the spiritual court against a marriage in a suit of justification of marriage is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy. And admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion." 11 *Harg. St. Tr.* 262.

Note 5, page 165, line 17, words *forfeit ten pounds*.—In the vagrant act the 17 Geo. II. c. 5. there is an exception in favour of soldiers having certificates from their officers, or the secretary at war; and also in favour of mariners having a testimonial from a justice of peace, who were thus licensed to beg. But by 32 Geo. III. c. 45. such certificates and testimonials were very properly declared to be null and void, and that all soldiers and mariners, who should wander abroad and beg, should be deemed rogues and vagabonds within the meaning of the vagrant act.

Note 6, page 166, line 33, words *these laws into practice*.—The severe statute of 5 Eliz. c. 20. is repealed by 23 Geo. III. c. 51. And gypsies are now only punishable under the vagrant act, which declares that "all persons, pretending to be gypsies, or wandering in the habit or form of Egyptians, shall be deemed rogues and vagabonds." 17 Geo. II. c. 5.

Note 7, page 168, line 15 words *lottery offices*.—The 19 Geo. III. c. 21. is repealed by the 22 Geo. III. c. 47. which introduces a great variety of regulations respecting lottery-office keepers. Among others it enacts, that no one shall keep an office for the sale of tickets in the public lottery, without a license from the stamp office, under a penalty of 100*l*. And if any person shall sell the chance or share of a ticket for less time than the whole time of drawing, or shall insure for or against the drawing of any ticket, or shall receive any money to return money or goods upon any contingency depending upon the tickets in the lottery, he shall forfeit 50*l*. And by the 27 Geo. III. c. 1. persons guilty of any of the preceding offences, may also be proceeded against as rogues and vagabonds, under the vagrant act; but if they are convicted as vagabonds, they are discharged from the pecuniary penalties. And no person shall sell any share less than a sixteenth, or without a stamp, under a penalty of 50*l*. But the owner of a whole ticket may insure his ticket with a licensed lottery-office keeper, so as to indemnify himself, and receive its value only. The assurance must be made for the whole remaining time of the drawing of the lottery, and in the manner prescribed by the act. If any editor of newspaper, or other person, advertizes any illegal scheme of gaming in the lottery, he is subject to a penal-

ty of 50*l*. 4 T. R. 414. The penalties under these statutes must be sued for within six months, in the courts at Westminster, and the defendant may be held to bail, to the amount of 500*l*. One half of the penalties is given to the prosecutors, the other half to the king.

Note 8, page 168, line 21, words *punishable by fine*.—And if any person shall make or sell any squibs, rockets, or fire-works, he shall forfeit, upon conviction before a magistrate, 5*l*. one half to the informer, and the other half to the poor. And if any person shall throw or fire them into any house, street, or highway, he shall forfeit 20*l*. in like manner. 9 & 10 W. III. c. 7.

Note 9, page 169, line 32, words of *any king-dom*.—Idle and disorderly persons are, 1. Those who threaten to run away, and to leave their families upon the parish; 2. Who return from the parish to which they are removed as paupers, without a certificate; 3. Who refuse to work for the usual wages; 4. Who beg within their own parishes; 5. And who neglect to work, or who spend their money idly, without making a sufficient allowance for the subsistence of their families. Rogues and vagabonds are thus described: 1. Gatherers of alms under pretence of losses, or for prisons or hospitals; 2. Fencers; 3. Bearwards; 4. Players of interludes, not being authorised by law; 5. Minstrels; 6. Jugglers; 7. Gypsies; 8. Fortune-tellers; 9. Deceivers by subtil craft; 10. Players and betters at unlawful games; 11. Persons who run away and leave their families chargeable to the parish; 12. Unlicensed pedlars; 13. Persons who wander abroad, and lodge in alehouses, outhouses; or in the open air, without giving a good account of themselves; 14. Persons wandering from home, under pretence of seeking harvest work, without a certificate from the minister and one churchwarden of their parish; 15. And all wandering beggars. And by 28 Geo. III. c. 88. all persons who are apprehended with any pick-lock or implement, with intent to feloniously break and enter any dwelling house, or with any offensive weapon, with intent to feloniously assault any person; or who shall be found in, or upon, any dwelling-house, out-house, yard, area, or garden, with intent to steal, shall be deemed rogues and vagabonds.

Rogues and vagabonds, who escape when they are apprehended, or refuse to go before a justice, or to be examined, or who give a false account of themselves, after warning of the consequences, or who refuse to be conveyed by a pass, or who escape from the house of correction, or who commit, after punishment, a second offence, become incorrigible rogues. When a person is convicted of being a rogue and a vagabond, before a justice of peace, the justice may order him to be whipt, or imprisoned till the next sessions, or for any less time; and if imprisoned till the next sessions, the justices may then order a further imprisonment for six months; female vagabonds are subject to the same imprisonment, but in no instance are liable to whipping, 32 Geo. III. c. 45. And the justice, or the court of quarter sessions, may, if they think proper, order a vagabond, after punishment, to be conveyed to his place of settle-

ment by a pass, but no justice of peace shall order any vagrant to be conveyed by a pass, who has not been actually whipt, or imprisoned for at least seven days, which shall be certified in the pass, 32 Geo. III. c. 45. The object of this was to correct an abuse, which much prevailed, of removing paupers by a pass, who had committed no act of vagrancy, and who ought to have been removed by an order of removal. For the effects of an order of removal and a vagrant pass are very different; in the first case, the parish removing, bears all the travelling expenses of the paupers; but the expense of conveying vagrants by a pass, is borne by each county through which they are carried. And no appeal lies against a vagrant pass, so that the parish to which the vagrant is conveyed, must be at the expense of sending, by an order of removal, the vagrant back again, or to such place as, upon inquiry, may be thought his legal settlement. 3 Burn. tit. Vagrants. c. x.

Note 10, page 172, line 39, words *so lost*.—If the loser does not recover back the money lost within three months, any other person may recover the same, and treble the amount besides, with costs, one half for himself, the other half for the poor. See 1 vol. p. 88. n. 20. If money be lent to game with, it may be recovered back as money lent, though the bond, note, or other security given for it is void. 2 Burr. 1077.

Note 11, page 173, line 29, words *advertise the plate*.—Newmarket and Black Hambleton are excepted, where a race may be run for any sum or stake less than fifty pounds. But though such horse races are lawful, yet it has been determined, that they are games within the statute of 9 Ann. c. 14. and that of consequence, bets or wagers above 10*l.* upon a lawful horse race, are illegal. 2 Bl. Rep. 706. A foot race, and a race against time, have also been held to be games within the statute of gaming. 2 Will. 36. A wager for less than 10*l.* upon an illegal horse race, is also void and illegal. 4 T. R. 1. Wagers in general, by the common law, were lawful contracts, and all wagers may still be recovered in a court of justice, which are not made upon games, or which are not such as are likely to disturb the public peace, or to encourage immorality, or such as will probably affect the interests, characters, and feelings of persons not parties to the wager, or such as are contrary to sound policy, or the general interests of the community. See 3 T. R. 693. where the legality of wagers is fully discussed.

Note 12, page 174, line 29, words *royal prerogative*.—This doctrine, so frequently repeated by the learned commentator, that no person had originally, or has now, a right to kill game upon his own estate, without a license, or grant from the king, is controverted at large, by the editor, in 2 vol. p. 423. n. 10.

Note 13, page 175, line 22, words *of superior degree*.—It is not necessary that it should be a freehold, or a legal estate, for copyhold, or an equitable estate of inheritance of the clear value of 100*l. per annum*, is a qualification. But it is not sufficient, if the value of the estate is reduced below that sum by the interest of a

mortgage, *Cald. Caf.* 230. A life-estate as a church benefice, must be of the clear annual value of 150*l.* See 1 vol. p. 60. n. 9. The eldest son of an esquire, or of any person of a higher degree, is qualified without any estate, whilst his father is living; but the father himself, though an esquire, doctor, knight, or person of still higher rank, is not qualified without having the estate required by the statute. *Jones v. Smart*, 1 T.R. 44. But by the 25 Geo. III. c. 50. and 31 Geo. III. c. 21. every person, who shall go in pursuit of game, without taking out a certificate from the clerk of the peace of the county or district, within which such person resides, shall forfeit 20*l.* The clerk of the peace shall receive for the certificate, 3*l.* 4*s.* and the certificate shall be in force from the day of its date till the first of July next following. And if any person shall produce his certificate to any other person, who is in pursuit of game, he may demand of him to shew his certificate, and if he does not, he may then demand of him his name, and place of abode, which if he refuses to give, or gives a false name or place of residence, he shall forfeit 50*l.* For gamekeepers, see 2 vol. p. 418. n. 9.

Note 14, page 175, (last line) words *had no qualification*.—But a person qualified to kill, is not subject to any penalty for buying game.

CHAPTER THE FOURTEENTH.

Of Homicide.

Note 1, page 188, line 23, words *verdict of acquittal*.—Where the homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal.

Note 2, page 190, (last line) word *premeditation*.—In the civil law, and the law of Scotland, the distinction between murder and manslaughter does not exist. And persons tried at the admiralty sessions, where the judges proceed according to the rules of the civil law, must either be convicted of murder or acquitted.

Note 3, page 192, line 31, words *goods and chattels*.—By the 19 Geo. III. c. 74. instead of burning in the hand, the court may, if they think fit, impose a moderate pecuniary fine, and this fine shall have the same legal effect and consequences as burning in the hand.

Note 4, page 196, line 15, words *boiling to death*.—This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime, which gave rise to it; for the preamble of the statute informs us, that John Roope, a cook, had been lately convicted of throwing poison into a large pot of broth, prepared for the bishop of Rochester's family, and for the poor of the parish; and the said John Roope was by a retrospective clause of the same statute ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. 3 *Inst.* 48. Murder of malice prepense, was made high treason in Ireland, by 10 Hen. VII. c. 21. *Irish Statutes.*

Note 5, page 196, (see note) word *prosecution*.—The guilt of him, who takes away the life of an innocent man by a false oath, is much more atrocious than that of an assassin, who murders by poison or a dagger. He, who destroys by perjury, adds to the privation of life public ignominy, the most excruciating of tortures to an honourable mind, and reduces an innocent family to ruin and infamy; but notwithstanding this is the most horrid of all crimes, yet there is no modern authority to induce us to think that it is murder by the law of England. Lord Coke says expressly "it is not holden for murder at this day." 3 *Instit.* 48. See also *Fost.* 132. Such a distinction in perjury would be more dangerous to society, and more repugnant to principles of sound policy, than in this instance the apparent want of severity in the law. Few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers.

Note 6, page 202, line 22, words *hung in chains*.—The judge, if he thinks it advisable, may afterwards direct the hanging in chains, by a special order to the sheriff; but it does not form any part of the judgment. *Fost.* 107.

Note 7, page 204, line 15, words *petit treason they are*.—It has been determined, that a person indicted for petit treason, may upon the evidence of one witness be convicted of murder, though acquitted of the petit treason. *Radbourne's case. Leach*, 363.

Note 8, page 204, line 24, words *the female sex*.—By the 30 Geo. III. c. 48. women shall no longer be sentenced to be burnt, but in all cases of high and petit treason they shall be condemned to be drawn and hanged, and in petit treason they shall be subject besides to the same judgment with regard to dissection, and the time of execution as is directed by the 25 Geo. II. c. 37. in cases of murder. Soon after the passing of the 25 Geo. II. c. 37. the majority of the judges agreed, that in the case of men convicted of petit treason, the judgment introduced by that statute should be added to the common law judgment for petit treason. *Fost.* 107.

CHAPTER THE FIFTEENTH.

Of Offences against the Persons of Individuals.

Note 1, page 207, line 15, words *without benefit of clergy*.—In a case where a gentleman had apprehended a pick-pocket, an accomplice followed and gave the gentleman a wound across the nose with a knife; this was held to be a *slitting of the nose* and a maiming within the statute. *Carroll's case. Leach*, 83. It has been determined that if a man deliberately watches an opportunity and carries his intention into execution, he may be said to lie in wait; but where a person went up to a man stealing turnips, who immediately cut him in the face, this was thought not to be lying in wait within the statute. *Tickner's case. Ib.* 170. A wound or incision in the throat has been held not to be a maiming. *Lee's case. Ib.* 49.

Note 2, page 208, line 2, words *thirty years after*.—The essence of this crime consists in *maliciously* shooting; no act of shooting therefore will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as in construction of law would have amounted to the crime of murder, if death had ensued from such an act; for there is no species of homicide in which malice forms any ingredient except that of murder; it follows therefore that a shooting in the transport of passion, excited by such a degree of provocation, as will reduce homicide to the offence of manslaughter, is not within the meaning of the statute—*Gastineau's case. Leach, 323.*

Note 3, page 209, line 32, words *of her said husband*.—It has been decided in the court of exchequer, that she forfeits her lands only during the life of her husband. *Amb. 73.* Though the more natural construction of the statute seems to be, that the next heir shall retain them during the life of the wife, even after the death of the husband. *Brown, 23.*

CHAPTER THE SIXTEENTH

Of Offences against the Habitations of Individuals.

Note 1, page 221, line 31, words *good behaviour*.—An attempt of preparation to set fire to one's own house in a town, though the fire is never kindled, is a misdemeanour.

Note 2, page 221, (last line) words *property of the tenant*.—And it has been expressly determined, that if a tenant set fire to the house of his landlord, he is not guilty of arson. *Becme's Case. Leach, 195. 209.*

Note 3, page 225, line 14, words *first committed*.—Where a house is built, purchased or rented, and is under repairs, or is making ready for the reception of the owner's family, no burglary can be committed in it, until the owner, or some part of his family, goes to inhabit it. *Lyon's Case. Leach, 169.*

Note 4, page 226, line 5, words *I never lie there*.—But where a shop was rented with some of the apartments of a house, it was held that the shop was still part of the dwelling-house, and that burglary might be committed in it, as the house of the landlord. *Gibson's Case. Leach, 287.*

Note 5, page 227, line 18, words *burglarious entries*.—In a case where a door had been bored through by an instrument called a *centro-bit*, the end of which must have penetrated beyond the internal surface of the door, it was held that this was not a sufficient entry to constitute a burglary. When the insertion of an instrument amounts to a burglarious entry, the instrument must be of such a nature as is calculated to effect the intended felony after the breaking is completed. *Higbet's Case. Leach, 313.*

CHAPTER THE SEVENTEENTH.

Of Offences against Private Property.

Note 1, page 230, line 19, words *these are no larcenies*.—But it is now fully established, that in all cases where horses, or carriages, are hired and are never returned, if the jury are of opinion from the circumstances that the persons to whom they are delivered intended at the time of hiring never to restore them, or that the intention to steal them or convert them to their own use existed in their minds at the time they gained possession, they are guilty of felony. *Pear's case*, and *Major Semple's case*. *Leach*, 189 & 327. And where a person hires a horse for a particular time, or to go a specific journey, and after complying with the terms of the special agreement sells it, his possession being then unsupported by any privity of contract or consent of the owner, he is held to be guilty of felony. *Ib.* And it is now generally held, that if the possession of property is obtained by any contrivance *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into cash, or gold into silver, it amounts to felony. See the respective cases of *Patch*, *Horner*, and *Aickles*, in *Leach*, 206, 226, 239.

Note 2, page 230, line 27, words *taken its effect*.—It has been decided that if a parcel is left by accident in a hackney coach, and the coachman instead of restoring it to the owner, opens it and embezzles part of its contents, he is guilty of larceny. *Wynne's case*. *Leach*, 320.

Note 3, page 230, line 32, words *breach of civil trust*.—But it seems that in every case the judges now determine, that the property of the master delivered by him into the custody of the servant still remains in the possession of the master, and if it is embezzled by the servant or converted to his use, he is guilty of felony. And when servants are convicted of robbing their masters, as the securities of families so much depends upon their honesty, and as the violation of the confidence reposed in them is a high aggravation of the crime, they are always punished with the utmost rigour, which the law admits.

Note 4, page 231, line 34, words *this is larceny*.—Where a man snatched an ear-ring from a lady's ear, and afterwards dropped it in her hair, it was held a sufficient carrying away to constitute a robbery. *Lapier's case*. *Leach*, 264. The removal of a parcel from one end of a waggon to the other, with an intent to steal, amounted to a larceny. *Ibid.* 264. But where a bale of goods was raised and placed upon its end in a perpendicular posture, this was thought not to be a sufficient carrying away, there not being a complete removal from the space it before occupied. *Ibid.* And where a man was stopped and ordered by the prisoner to put down upon the ground a parcel which he was carrying, but which the prisoner did not afterwards take up, this was held not a sufficient asportation to complete the crime of robbery. *Furriel's case*. *Ibid.* 266.

Note 5, page 234, line 37, word *clergy*.—To secrete a letter containing money, is not an offence within this statute, but will be a simple larceny, or a larceny in a dwelling-house, according to the circumstances of the case. *Stutt's case. Leach, 100.*

Note 6, page 235,* line 13, words *that has been stolen*.—This statute scarcely deserves the censure conveyed in the learned Judge's note; for though many persons may not estimate at a high rate the intrinsic value of this kind of property, yet dogs are frequently the favourites of their owners, and few thieves who are guilty of stealing dogs, would confine their depredations to this single article. The penalty for the first offence is only from 20 to 30 pounds, and if paid no farther punishment can be inflicted. Dr. Burn seems to have suggested a very idle doubt, whether a man under this statute can be convicted for stealing a bitch, as the word *dog* alone is used throughout the statute. (*tit. Dogs.*) When it is necessary to distinguish the sexes, we are obliged to resort to the word *bitch*, but we have no other words than *dogs* to comprise the whole canine species of both sexes, in which sense it unquestionably was used by the legislature in this statute.

Note 7, page 238, line 9, words *much greater value*.—In a prosecution for a simple larceny, it is immaterial to the prisoner whether he is convicted of grand or petty larceny, the punishment of both being now the same.

Note 8, page 239, line 2, words *specified in the acts*.—The cattle specified are horned cattle of every description; and the benefit of clergy has not yet been taken away from the simple stealing of mules, asses, or swine.

Note 9, page 241, line 5, words *offence to be committed*.—It has been held that privately stealing money to the amount of five shillings, is not within the statute 10 & 11 W. III. c. 23. Shops and warehouses when they are used merely as repositories of goods, and not as places of sale, are not within the act, and consequently a prisoner cannot be convicted of privately stealing in a shop an article, which is not exposed there for sale, but which happens to be left there to be repaired, or for some other similar purpose. And with regard to coach-houses and stables, the articles must be such as are generally deposited there. *Eccl. 78. Leach, 43. 235. 248. 274*—In prosecutions under this statute, it is held not to be privately stealing if any person whatever see or perceive the theft at the time it is committed. And where there are several shopmen employed in a shop, they must appear at the trial to prove they did not perceive the theft, or the judge will direct the jury to presume that the stealing was not done privately.

Note 10, page 241, line 11, words *any such offence*.—A person cannot be convicted capitally for stealing to the value of 40s. in his own house, nor a wife in her husband's house. *Thompson's case. Leach, 277.* Upon an indictment for burglariously breaking and entering a dwelling-house, and stealing therein property to the value

of 40s. the prisoner may be acquitted of the burglary, and be capitally convicted of stealing in the dwelling-house. *Willan's case*. *Ib.* 83.

Note 11, page 242, line 4, words *Athenian laws*.—It had been held that this statute was only meant to protect persons, who were obliged to go into public assemblies, as churches, courts, and markets, and whose persons thereby became exposed to the attempts of pickpockets, and that it did not apply to persons who lost their property when they were asleep. But this distinction has been determined to be unfounded by a decision of the judges, and there have since been several capital convictions for stealing privately from persons asleep. *Willan's case*. *Leach*, 393.

It used to be held that no one could be convicted capitally of privately stealing from the person, if the theft was perceived by any one at the time, as the case of privately stealing in a shop; but the words of the 8 Eliz. c. 4. are the felonious taking from the person of another *privily without his knowledge*, the fair construction of which is, that it is capital to steal privily without the knowledge of the owner of the property, though the theft may be observed at the time by others. And it is now understood that this construction is adopted by the judges.

Note 12, page 243, line 12, words *against his consent*.—Mr. J. Ashurst is reported to have thus expressed himself in delivering the opinion of the judges in *Willan's case*, *Leach*, 232. "The true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror, as to induce the party *unwillingly* to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being forced to part with his property; and the judges are unanimously of opinion, that upon the principles of law, and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes, is a sufficient force to constitute the crime of robbery by putting in fear."

Note 13, page 243, line 24, word *robbery*.—This distinction has been frequently admitted by the judges in prosecutions for robbery, viz. that if any thing is snatched suddenly from the head, hand, or person of any one without any struggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, it does not amount to robbery. But if any thing is broken or torn in consequence of the sudden seizure, it would be evidence of such force as would constitute a robbery; as where part of a lady's hair was torn away by snatching a diamond pin from her head, and an ear was torn by pulling off an ear-ring, each of these cases was determined to be a robbery. *Leach*, 238.

Note 14, page 245, line 33, words *straw, hay, or wood*.—As the setting fire to property of this kind, where a house or out-house was not burned, was not felony by the common law, it has been held that setting fire to a *parcel* of unthreshed wheat is not a felony, being not within the description of any articles specified in the statute. *Judd's case. Leach, 381.*

Note 15, page 245, line 36, words or *wound any cattle*.—It has frequently been determined, that to constitute a felony within the meaning of the statute, the killing or maiming must proceed from malice or revenge to the owner of the animal; and it is not sufficient if it is only the effect of a brutal disposition, or of a sudden passion conceived against the beast itself. *Shepherd's case. Leach, 436.*

Note 16, page 247, line 8, words *malicious mischief*.—And by statute 22 Geo. III. c. 40, if any person shall break into any house or shop with intent to cut or destroy any serge, woollen, velvet, silk, linen or cotton goods, in the loom, or any stock or utensils used in manufacturing such goods, he shall be guilty of felony without benefit of clergy.

Note 17, page 249, line 17, words *fourteen years*.—And by 24 Geo. III. sess. 2. c. 53. such offences are made capital felonies.

Note 18, page 249, (last line) words *counterfeit seal*.—And by 24 Geo. III. sess. 2. c. 37. to forge the superscription of any letter, in order to avoid the payment of the postage, is a felony punished by transportation for seven years.

Note 19, page 250, line 16, words or *delivery of goods*.—The judges have decided that an order to a shopkeeper in a forged name to deliver goods to the bearer is not a forgery within the statute; but a warrant or order within the statute 7 Geo. II. c. 22. must import that the person giving such warrant or order has, or at least claims, an interest in the money or goods, which are the subject-matter of that warrant or order, that he has or at least assumes a disposing power over such money or goods, and takes upon himself to transfer the property, or custody of them to the person in whose favour such warrant or order is made. *Mitchell's case. Fost. 120.* And it must be directed to the person, who has the custody of the goods. *Clench's case. Leach, 437.* But a draft upon a banker in the name of a person who kept no cash at the banker's shop, is a forgery within the statute, as it assumes that there was cash kept at the house, which the drawer had authority to dispose of. *Locket's case. Ibid. 89.*

Note 20, page 250, line 21, words *made a capital crime*.—It has frequently been determined that drawing, indorsing or accepting a bill of exchange in a fictitious name is a forgery. *Bolland's case, &c. Leach, 78. 159. 192.* It is also forgery to fabricate a will by counterfeiting the name of a pretended testator, who is still living. *Cogan's case. Ibid. 355.*

A bill of exchange may be produced in evidence against a prisoner prosecuted for the forgery of it, and he may be convicted.

upon the usual evidence of the forgery, though it has never been stamped pursuant to the stamp acts. *Hawkefwood's case. Ibid. 221.*

CHAPTER THE NINETEENTH

Of Courts of a Criminal Jurisdiction.

Note 1, page 259, (last line) words *for any crime*.—But according to the last resolution of the house of lords, a commoner may be impeached for a capital offence.—On the 26th of March, 1680, Edward Fitzharris a commoner was impeached by the commons of high treason. Upon which the attorney-general acquainted the peers that he had an order from the king to prosecute Fitzharris by indictment, and a question thereupon was put, whether he should be proceeded against according to the course of the common law or by way of impeachment, and it was resolved against proceeding in the impeachment. 13 *Lord's Journ.* p. 755. Fitzharris was afterwards prosecuted by indictment, and he pleaded in abatement that there was an impeachment pending against him for the same offence; but this plea was over-ruled, and he was convicted and executed. But on the 26th of June 1689, Sir Adam Blair and four other commoners were impeached for high treason, in having published a proclamation of James the Second. On the 2d of July a long report of precedents was produced, and a question was put to the judges whether the record 4 Edw. III. N^o. 6. was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself, they could be more positive. It was then moved to ask the judges, but the motion was negatived, whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners and charged with high treason. 14 *Lord's Journ.* p. 260.

But the impeachment was not prosecuted with effect, on account of an intervening dissolution of the parliament.

Note 2, page 261, line 26, words *in parliament*.—It has of late been confidently advanced, that the lords are not bound to observe the same rules of evidence in an impeachment, as are admitted in criminal trials in the inferior courts. The high reputation of those, who strenuously maintained this doctrine, induced the editor to endeavour to prove, that it was not only contrary to all precedent and authority, but repugnant to the first and great principles both of the English law and constitution, in a pamphlet, entitled "A Dissertation, shewing that the house of lords in cases of judicature are bound by precisely the same rules of evidence, as are observed by all other courts." See more upon impeachments in page 399.

Note 3, page 262, line 30, words *upon the trial*.—The decision is by a majority, but a majority cannot convict, unless it consists of twelve or more. See 3 vol. p. 376. n. 20.

Note 4, page 263, line 11, words *against popery*.—As a peer cannot have the benefit of a challenge like a commoner, (1 *Harg. St. Tr.* 198. 388.) it is somewhat surprising that this manifest improvement of the law and constitution was not extended to trials of peers for all felonies, in the court of the lord high steward. Lord Mountmorres informs us that there are but two instances of the trials of peers in Ireland, *viz.* of viscount Netterville, in 1743, and of lord Santry about the same time. The first was tried in the high court of parliament, the latter in the court of the high steward. They were both indicted for murder. Lord Netterville was acquitted, lord Santry was convicted, but pardoned as to his life. Upon lord Santry's trial all the peers were summoned, though the regulation of 7 W. III. was not introduced into Ireland till the year 1773. *Lord Mountm.* 2 vol. 197. Murder is high treason by the law of Ireland.

Note 5, page 265, line 17; words *their second husband*.—But peeresses by marriage cannot be said to be ennobled by blood; for after the death of their husbands they have even a less estate in their nobility than bishops, it being only *durante viduitate*. See the editor's conjecture how the notion was originally introduced that bishops were not entitled to a trial by the peers in parliament, Vol. I. p. 425. n. 8. Since that note was written, the editor has been happy in finding what he suggested only as a conjecture drawn from general principles confirmed by the more extensive learning of the late Vinerian professor Mr. Wooddison, who not only has adopted the same opinion, but has adduced in confirmation of it several instances of Bishops, who being arraigned before a jury, demanded the privileges of the church and disclaimed the authority of all secular jurisdiction. 2 *Woodd.* 585.

Note 6, page 265, line 27, words *indictment is brought*.—All informations filed in the courts of king's bench, and all indictments removed there by *certiorari*, if not tried at the bar of the court, which rarely happens, must be tried at the assizes by writ of *nisi prius*.

Note 7, page 266, line 2, words *dicente jus regis*.—But by the 25 Geo. III. c. 18. it is enacted that the session of oyer and terminer, and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall not be discontinued on account of the commencement of the term, and the sitting of the court of king's bench at Westminster, but may be continued till the business is concluded. And the 32 Geo. III. c. 48. was passed to continue in like manner the sessions of the peace, and of oyer and terminer, held before the justices of the peace for the county of Middlesex.

Note 8, page 266, (see note) words *dissolution of that court*.—In one of the statutes of the university of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. The statute is entitled *De computatione procuratorum*, and it directs that *in fine computi fiat starrum per modum dividende, in quo ponentur omnia remanentia in communi cista tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus constare poterit evidenter, in*

quo statu tunc universitas fuerit quoad bona, &c. Stat. Acad. Cant. p. 32. Such inventories would be made at the king's exchequer, and the room where they were deposited would probably be called the Star-chamber.

Note 9, page 467, (see note) words *practitioner therein*.—Hudson's Treatise of the Court of Star-Chamber is now published at the beginning of the 2d Vol. of Collectanea Juridica.

Note 10, page 271, line 31, word *clergy*.—It is the practice to try all simple larcenies at the quarter sessions, whatever may be the value of the articles stolen; but it is stated in the indictment to be of some value not exceeding a shilling, in order to reduce the crime to petty larceny. The justices never try any felonies, upon conviction of which the prisoner must pray the benefit of clergy, or now the benefit of the statute. For before the 5 Ann. c. 6. sentence of death in all such cases must have been passed upon those, who could not read. And it may still be doubted whether it must not be passed upon a convict who obstinately refuses to pray the benefit of that statute. See p. 370. *post*.

CHAPTER THE TWENTIETH.

Of Summary Convictions.

Note 1, page 283, line 8, words *authority of the court*.—By 26 Geo. III. c. 44. persons committed to prison upon an attachment for non-payment of money, awarded to be paid upon a submission to an arbitration, which has been made a rule of court, or upon an attachment for not paying costs, may have the benefit of that statute, as insolvent debtors.

Note 2, page 287, line 29, words *any interrogatories*.—Although the defendant acknowledges all the facts charged against him, yet it is the practice of the court to compel him to answer interrogatories, unless they are waived by the prosecutor. 5 T. R. 362.

CHAPTER THE TWENTY-FIRST.

Of Arrests.

Note 1, page 293, line 9, word *suspected*.—Where a felony has been actually committed, a private person acting with a good intention, and upon such information as amounts to a reasonable and probable ground of suspicion, is justified in apprehending, without a warrant, the suspected person, in order to carry him before a magistrate. *Cald. 291.* But a peace-officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed. *Samuel v. Payne, Doug. 345.*

CHAPTER THE TWENTY-THIRD.

Of the several Modes of Prosecution.

Note 1, page 303, line 19, words *oppressive purposes*.—Upon an indictment for high treason against the earl of Shaftesbury, in the year 1681, the evidence was given in public before the grand jury at the Old Bailey, and the gentlemen of the jury expressing some doubts with regard to the legality of the proceeding, lord C. J. Pemberton and C. J. North both declared that it had always been the practice to examine the witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king. 3 *Harg. St. Tr.* 417. But I apprehend this is the last instance of such a procedure.

Note 2, page 305, line 31, words *year 1691*.—Bigamy may be tried either in the county where the offence is committed; or where the offender is apprehended. 1 *Jac. I. c.* 11.

Note 3, page 312, line 37, words *civil proceeding*.—Because an information in the nature of a *quo warrant* is considered merely as a civil proceeding, the court of king's bench will grant a new trial, though the verdict should have been given for the defendant. 2 *T. R.* 484.

Note 4, page 317, line 19, words *se introducto*.—Some appeals of late years have been commenced, but not prosecuted with effect. 5 *Burr.* 2643. They have probably been compromised, as the chief object of an appeal in all times was to compel the defendant to make a pecuniary compensation. For when the verdict in an appeal was given in favour of the appellant, he might insist upon what terms he pleased as the ransom of the defendant's life, or a commutation of the sentence. In an appeal, in which the defendant was found guilty of manslaughter, it was doubted whether the king could pardon the burning in the hands; and the defendant compounded with the appellant for 40 marks. 3 *P. Wms.* 453.

CHAPTER THE TWENTY-FOURTH.

Of Process upon an Indictment.

Note 1, page 319, line 36, words *guilty by his country*.—In most cases now in which a person convicted by a verdict is deprived of clergy, a person outlawed will also be ousted of clergy, yet some few instances may perhaps still remain where a person outlawed will have clergy, though if he had been tried for the same offence, he would have been capitally convicted. See *Egton*, 358; 2 *Leach. Hawk.* 481. 4 *T. R.* 543.

CHAPTER. THE TWENTY-FIFTH.

Of Arraignment and its Incidents.

Note 1, page 322, line 8, words *in the indictment*.—This word is Latin (Lord Hale says) is no other than *ad rationem ponere*, and in French *ad resson*, or abbreviated a *resn*. 2 H. P. C. 216.

Note 2, page 322, (last line) words *his arraignment*.—And it has since been held that the court has no authority to order the irons to be taken off, till the prisoner has pleaded, and the jury are charged to try him. *Waite's case*. *Leach*, 34.

Note 3, page 325, line 30, words *in execution*.—Aulus Gellius with more truth has made the same observation upon the cruel law of the Twelve Tables *De inops debitorum secundo*, "*Ea consilio tanta immenitas pena denunciata est, ne ad eam unquam perveniretur* ; for he adds, *difficilium esse antiquitus neminem equidem neque legi neque audiri*. lib. 20. c. 1. But with respect to the horrid judgment of the *peine forte et dure*, the prosecutor and the court could exercise no discretion, or shew no favour to a prisoner, who stood obstinately mute. And in the legal history of this country there are numerous instances of persons, who had resolution and patience to undergo so terrible a death, in order to benefit their heirs by preventing a forfeiture of their estates, which would have been the consequence of a conviction by a verdict.

Note 4, page 329, line 21, words *confession of the crime*.—Two instances have occurred since the passing of this statute of persons, who refused to plead, and who in consequence were condemned and executed. One was at the Old Bailey for murder in 1777, the other was for burglary at the summer assizes at Wells in 1792.

Note 5, page 331, line 13, words *such discovery*.—The persons described in the above statutes, and also those persons to whom the king, by special proclamation in the gazette or otherwise, has promised his pardon, lord Mansfield says have a right to a pardon. *Corup.* 224.

Note 6, page 331, (last line) words *of the same degree*.—In the case of Mrs. Rudd, in which this subject is clearly and ably explained by lord Mansfield, and again by Mr. J. Aston, in delivering the opinion of all the judges, (*Corup.* 331.) it is laid down that no authority is given to a justice of peace to pardon an offender, and to tell him he shall be a witness at all events against others. But where the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage a hope that he, who will behave fairly and disclose the whole truth and bring the others to justice, shall himself escape punishment. But this discretionary power exercised by the justices of peace is founded in practice only, and cannot control the authority of the court of gaol delivery, and exempt at all events the accomplice from being prosecuted. A motion is always made to the judge for leave to admit an accomplice to be a witness, and unless

he should see some particular reason for a contrary conduct, he will prefer the one to whom this encouragement has been given by the justice of peace. This admission to be a witness amounts to a promise of a recommendation to mercy, upon condition that the accomplice makes a full and fair disclosure of all the circumstances of the crime for which the other prisoners are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition, he forfeits all claim to protection. And upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted; but the judge ordered an indictment to be preferred against this accomplice for the same crime, and upon his previous confession and other circumstances he was convicted and executed. And if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.

The learned commentator says, that the accomplice thus admitted a witness, shall not afterwards be prosecuted for that or any other previous offence of the same degree. Mrs. Rudd's case does not warrant the extent of that position, for the decision of that case, and what is advanced by Mr. J. Aston, (*Corup.* 341.) and as the editor conceives the reason and principles of this doctrine, will not extend the claim of the witness to mercy beyond those offences in which he has been connected with the prisoners, and concerning which he has previously undergone an examination.

CHAPTER THE TWENTY-SIXTH.

Of Plea, and Issue.

Note 1, page 340, line 29, words *his innocence appear*.—The learned judge's explanation of *prit* from *præsto sum*, or *paratus verificare*, however ingenious, is certainly inconsistent both with the principles and practice of special pleading. After the general issue, or the plea of not guilty, there could be no replication; or the words *paratus verificare* could not possibly have been used. This plea in Latin was entered thus upon the record: *Non inde est culpabilis, et pro bono et malo ponit se super patriam*; after this the attorney-general, the king's coroner, or clerk of assize could only join issue by *facit similiter*, or *he doth the like*. (See App. p. 3. at the end of this book.) If then I might be allowed to indulge a conjecture of my own, I should think that *prit* was an easy corruption of *pnt*, written for *ponit*, by the clerk, as a minute that issue was joined, or *ponit se super patriam* or *pnt se* might be converted into *prist* or *prest*, as it is sometimes written. *Cul* was probably intended to denote the plea, and *prit* the issue; and these syllables being pronounced aloud by the clerk to give the court and prisoner an opportunity of hearing the accuracy of the minute, and being immediately followed by the question, How wilt thou be tried? naturally induced the ignorant part of the audience to suppose that *cul prit* was an appellation given

to the prisoner. As a confirmation of the conjecture that *pnt* is a corruption of *pnt.*, the clerk of arraigns at this day, immediately after the arraignment, writes upon the indictment over the name of the prisoner, *puts*. And Roger North informs us, that in ancient times, when pleadings in the courts were *ore tenus*, "if a serjeant in the common pleas said *judgment*, that was a demurrer; if *prist*, that was an issue to the country." *Life of Lord Keeper North*, 98.

CHAPTER THE TWENTY-SEVENTH

Of Trial and Conviction.

Note 1, page 348, line 17, words *the same offence*.—The last time that the trial by battle was awarded in this country, was in the case of lord Rea and Mr. Ramsey, in the 7 Ch. I. The king by his commission appointed a constable of England to preside at the trial, who appointed a day for the duel, on which the combatants were to appear with a spear, a long sword, a short sword, and a dagger; but the combat was prorogued to a further day, before which the king revoked the commission. See an account of the proceedings, 11 *Harg. St. Tr.* 124.

Note 2, page 348, line 22, words *tried by jury*.—The nobility are tried by their peers for treason, and felony, and misprision of these; but in all other criminal prosecutions they are tried like commoners by a jury. 3 *Inst.* 30. See 1 vol. 424. n. 7.

Note 3, page 351, line 19, words *of the same*.—Every defendant indicted for a misdemeanour should give full eight days notice of trial to the prosecutor, before the assizes, if the trial is to be there; if at the sessions, it is usual to give two or three days notice. *Cr. Circ. Comp.* 17. 48. Or the justices at sessions fix a general rule what time they think a reasonable notice in such cases.

Note 4, page 352, line 14, words *oyer and terminer*.—It is the practice to deliver the copy of the indictment, and the lists of witnesses and jurors, ten clear days, exclusive of the day of delivery and the day of trial, and of intervening Sundays previous to the trial. *Foss.* 2. 250.

Note 5, page 353, line 8, words *justly famous*.—A peremptory challenge is not allowed in the trial of collateral issues. *Foss.* 42. Nor in any trial for a misdemeanour. 2 *Harg. St. Tr.* 808. and 4 *H. St. Tr.* 1.

Note 6, page 343, line 33, words *be sworn*.—And the practice is the same both in trials for misdemeanours and for capital offences. 3 *Harg. St. Tr.* 519.

Note 7, page 356, line 14, words *in the former act*.—Upon the trial of issues which do not turn upon the question of guilty or not guilty, but upon collateral facts, prisoners under a capital charge, whether for treason or felony, always were entitled to the

full assistance of counsel. *Fest. 232. 42.* It is very extraordinary that the law of England should have denied the assistance of counsel, when it is wanted most, *viz.* to defend the life, the honour, and all the property of an individual. It is the extension of that maxim of natural equity, that every one shall be heard in his own cause, that warrants the admission of hired advocates in courts of justice; for there is much greater inequality in the powers of explanation and persuasion in the natural state of the human mind, than when it is improved by education and experience. Amongst professional men of established character, the difference in their skill and management is generally so inconsiderable, that the decision of the cause depends only upon the superiority of the justice in the respective cases of the litigating parties. Hence the practice of an advocate is absolutely necessary to the administration of substantial justice. An honourable barrister will never mis-state either law or facts within his own knowledge, but he is justified in urging any argument, whatever may be his own opinion of the solidity or justness of it, which he may think will promote the interests of his client; for reasoning in courts of justice and in the ordinary affairs of life seldom admits of geometrical demonstration; but it happens not unfrequently that the same argument, which appears sophistry to one, is sound logic in the mind of another, and every day's experience proves that the opinions of a judge and an advocate are often diametrically opposite. Many circumstances may occur, which will justify or compel an individual member of the profession to refuse the defence of a particular client, but a cause can hardly be conceived which ought to be rejected by all the bar; for such a conduct in the profession would excite so strong a prejudice against the party, as to render him in a great degree condemned before his trial. Let the circumstances against a prisoner be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms, which the wisdom of the legislature has established as the best protection of the liberty and the security of the subject. But the conduct of counsel in the prosecution of criminals, ought to be very different from that which is required from them in civil actions, or when they are engaged on the side of a prisoner; in the latter cases they are the advocates of their client only, and speak but by his instruction and permission; in the former they are the advocates of public justice, or to speak more professionally, they are the advocates of the king, who in all criminal prosecutions, is the representative of the people, and both the king and the country must be better satisfied with the acquittal of the innocent, than with the conviction of the guilty. Hence in all criminal prosecutions, especially where the prisoner can have no counsel to plead for him, a barrister is as much bound to disclose all those circumstances to the jury, and to reason upon them as fully, which are favourable to the prisoner, as those, which are likely to support the prosecution.

Note 8, page 353, line 30, words *left to a jury.*—But the proof of

hand-writing is not evidence in high treason, unless the papers are found in the custody of the prisoner. 1 Burr. 644.

Note 9, page 364, line 4, words in a former chapter.—The owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased them and sold them again, even with notice of the theft, before conviction. 2 T. R. 750.

And if the owner of goods loses them by a fraud and not by a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them, against a person, as a pawnbroker, who has fairly acquired a new right of property in them. 5 T. R. 175.

CHAPTER THE TWENTY-EIGHTH

Of the Benefit of Clergy.

Note 1, page 367, (last line) words *robbing of churches*.—Upon the conviction of the duchess of Kingston, for bigamy, it was argued by the attorney-general Thurlow, that peeresses were not entitled by 1 Edw. VI. c. 12. like peers, to the privilege of peerage; but it was the unanimous opinion of the judges, that a peeress convicted of a clergyable felony ought to be immediately discharged without being burnt in the hand, or without being liable to any imprisonment. 11 H. St. Tr. 264. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with.

Note 2, page 370, line 24, words *conditional merit*.—The statute enacts, that if a person convicted of a clergyable offence *shall pray the benefit of this act*, he shall not be required to read, but shall be taken to be, and punished as, a clerk convict. Hence persons convicted of manslughters, bigamies, and simple grand larcenies, are still asked what they have to say why judgment of death should not be pronounced upon them? And they are then told to kneel down and pray the benefit of the statute. It would perhaps have been more consistent with the dignity of a court of justice to have granted the benefit of clergy, without requiring an unnecessary form, the meaning of which very few comprehend.

Note 3, page 373, line 12, words *as they offend*.—But clergymen have no privilege in petty larcenies, but they are liable to be whipped or transported, like other persons, for a petty larceny, though they are subject to no corporal punishment whatever, upon being convicted of a grand larceny or any clergyable felony.

Note 4, page 373, line 30, word *proper*.—A layman, who has once had the benefit of clergy, may be precluded from obtaining it a second time, by a counterplea on the part of the prosecution, averring the identity of the prisoner's person, and that he had before been allowed the benefit of his clergy, though the second crime be quite different from the first. As a person convicted of bigamy

is liable to suffer death for a manslaughter, or any other clergyable felony. *Scott's case. Leach, 312.*

Note 5, page 373,* line 24, words *in a dwelling-house*.—In the case of all capital larcenies in a dwelling-house, the benefit of clergy has been taken away, as well from those who aid, assist, and abet, as from those who actually commit the crime, by 3 *W. & M. c. 9.* and 12 *Ann. st. 1. c. 7.* See p. 240. *ante.*

CHAPTER THE TWENTY-NINTH.

Of Judgment and its Consequences.

Note 1, page 376, line 31, words *burned alive*.—But this is now altered by 30 Geo. III. c. 48. See p. 204. n. 7. *ante.*

Note 2, page 379, line 22, words *his countenance*.—Lord Coke says, that “contentment signifieth his countenance, as the armour of a soldier is his countenance, the books of a scholar his countenance, and the like.” 2 *Inst.* 28. He also adds, that “the *wainage*, is the countenance of the villain, and it was great reason to have his wainage, for otherwise the miserable creature was to carry the burden on his back.” *Ibid.*

CHAPTER THE THIRTY-FIRST.

Of Reprieve and Pardon.

Note 1, page 395, line 27, words *sentence of justice*.—As the execution of the law in the first instance is respited not from a regard for the mother, but from tenderness towards the innocent infant; if then it should happen that she becomes quick of a second child; this surely is as much an object of compassion and humanity as the first.

Note 2, page 400, line 6, words *most gracious pardon*.—The following remarkable record, in which it is both acknowledged by the commons and asserted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments, is as ancient as the constitution itself.

Item prie la commune a nostre dit seigneur la roi que nul pardon soit grante a nully persone, petit ne grande, q'ont este de son conseil et seremeniez, et sont empeschez en cest present parlement de vie ne de membre, syn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, lesqueux sont ou seront trouvez en aucun defaut encontre leur ligeance, et la tenure de leur dit serement; mais q'ils ne seront jaumes conseillers ne officers du roi, mais en tout onstex de la courte le roi et de conseil as touz jourz. Et sur ceo soit en present parlement fait estatut s'il plect au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et de roialme.

Respondit.—La roi ent fra sa volente, come mieltz lui semblera.
R. Parl. 50 Ed. III. n. 188.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him, for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of lords; but when the question was afterwards proposed in the house of commons, *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate, but (the previous question being first moved) it was carried in the affirmative by a majority of 136 voices against 65. *Comm. Journ.* 27 May 1725. 6 *H. St. Tr.* 762. In the impeachment of Warren Hastings, Esq. it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the parliament, though almost all the legal characters of each house voted in the minorities.

Note 3, page 401, line 35, words 19 *Geo. III. c. 74.*—
ther by 24 *Geo. III. c. 56* and 31 *Geo. III. c. 46*.

Note 4, page 402, (last line) words *inherited* at
after the attainder may inherit if he has no elc
born before the attainder, otherwise the land wi
tu bacredis. 1 *H. P. C.* 358.

CHAPTER THE THIRT

Of Execution.

Note 1, page 403, (last line) words *a may*
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the only warrant that the sheriff has for th
yet it is made with more caution and sole.
by the learned commentator. At the
of affize makes out in writing four
separate columns, con-
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Note 3, page 424, line 23, *words of the land*.—The following is the celebrated 29th chapter of *magna charta*, the foundation of the liberty of Englishmen:

Nullus liber homo capiatur, vel imprisonetur, aut disseisatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum vel per legem terre. Nulli vendemus, nulli negabimus, aut differemus rectum vel iustitiam.

Note 2,
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" nance, and the
" gium, is the coun-
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" carry the burden

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